

A  
A  
0  
0  
0  
7  
9  
1  
6  
1  
9  
0



UC SOUTHERN REGIONAL LIBRARY FACILITY

LAW LIBRARY  
OF  
LOS ANGELES COUNTY





THE LIBRARY  
OF  
THE UNIVERSITY  
OF CALIFORNIA  
LOS ANGELES

SCHOOL OF LAW



100-50

FEDERAL  
DEPARTMENT OF COMMERCE  
BUREAU OF MARITIME COMMERCE  
OFFICE OF THE SECRETARY  
WASHINGTON, D. C.

**LAW LIBRARY,  
OF  
LOS ANGELES COUNTY**

**POMONA BRANCH**

**WITHDRAWN**

**L. A. CO. L. L.**



LAW LIBRARY  
OF  
LOS ANGELES COUNTY

POMONA BRANCH  
WITHDRAWN

L. A. CO. L. L.



WITHDRAWN  
11 11 11 11 11

# FEDERAL LIABILITIES OF CARRIERS

A TREATISE UPON THE DUTIES AND LIABILITIES OF COMMON  
CARRIERS BY RAILROADS UNDER ALL FEDERAL LAWS, WITH  
AN APPENDIX CONTAINING A COPY OF THE FEDERAL  
STATUTES AFFECTING RAILROADS, AND THE GEN-  
ERAL ORDERS OF THE DIRECTOR GENERAL OF  
RAILROADS UNDER THE FEDERAL CONTROL  
ACT OF 1918.

By M. G. ROBERTS  
Of the Missouri Bar

*Author of "Injuries to Interstate Employes on Railroads"*

IN TWO VOLUMES  
VOLUME I

CHICAGO  
CALLAGHAN AND COMPANY  
1918



T  
R5434f  
1918

COPYRIGHT 1918  
BY  
M. G. ROBERTS.



DATE 3 June 53

LOS ANGELES COUNTY  
LAW LIBRARY

PREFACE

TO THE  
MEMORY OF MY  
FATHER AND MOTHER





## PREFACE

At least three-fourths of the traffic carried by the railroads within the United States is interstate or foreign in character and, therefore, falls within the control of Congress under the commerce clause. During the course of recent years, state laws, rules and regulations governing the rights of *interstate* shippers and employes and the correlative duties of the carriers have been superseded by federal statutes and common law principles as interpreted and applied in the national courts.

The vast and revolutionary changes wrought by the enactment of these national laws, have created a distinct and separate body of jurisprudence from that which regulates the obligations of common carriers to *intrastate* shippers and employes. The law of carriers, therefore, as expounded in text books dealing with the diversified statutes of the several states and the principles of the common law as interpreted in the decisions of state courts, has become obsolete as to all transportation duties not intrastate in character; for the enactment of the Interstate Commerce Act, the Carmack Amendment, the first and second Cummins amendments of 1915 and 1916, the Act of 1918 providing for government control during the war with Germany, the federal Employers' Liability Act, the Safety Appliance Act, the Hours of Service Act, and other federal statutes, has produced and established uniform rules of liability governing carriers throughout the United States.

A treatise dealing with the responsibilities of the railroads under all of these federal laws in the light of the binding decisions of the national courts and the application thereof by state courts, is opportune and should be of permanent value. The profession has been liberally supplied with digests and annotations of decisions under federal statutes, but the limitations of such useful publications are such that no attempt is usually made to distinguish the wheat from the chaff, the correct from the erroneous ruling, or to extract the elementary principles from a multitude of judicial voices.

In the following pages, an effort has been made to methodically classify and expound the fundamental rules which measure the obligations of carriers under the national laws; to illustrate these principles by their application in the leading adjudicated cases in federal and state courts; to point out the decisions which do not correctly interpret the law of interstate commerce as regulated by the federal statutes, and, in short, to write a text book covering the entire subject matter and not a digest or an annotation. Recognizing also the dual control of the federal government and the states, one over interstate and the other over intrastate transportation, an endeavor has been made to discuss the principles defining the "twilight zone" wherein the jurisdiction of the one ends and the other begins. Such problems, in the absence of an amendment to the federal Constitution, will constantly arise in the application of the rules of law to the concrete facts of a particular case.

Part One of the Treatise deals with the general rules governing federal and state control over interstate common carriers and transportation under the commerce clause, and also, separately, during times of war under the war clause of the Constitution, including the national act of 1918 providing for federal control of carriers during the war with Germany.

Part Two treats of the duties and liabilities of common carriers to shippers under all federal inter-



state laws including the Interstate Commerce Act and supplementary legislation—the Hepburn Act of 1906, the Carmack Amendment and the first and second Cummins amendments.

Part Three deals with personal injuries to interstate employes of common carriers by railroad, being a treatise of the Federal Employers' Liability Act. This part of the work includes the author's former treatise, "Injuries to Interstate Employes on Railroads" which has been thoroughly revised, rewritten, greatly enlarged and contains copious citations of the new and late decisions.

Part Four treats of the duties and liabilities of interstate carriers under the federal Safety Appliance Act, as amended.

Part Five includes the duties of carriers under other miscellaneous federal interstate laws such as the Hours of Service Act, Twenty-eight Hour Live Stock Law, the Boiler Inspection Act, Adamson Law, etc.

I am greatly indebted to Mr. J. C. Cahill, Managing Editor of Callaghan and Company for many helpful suggestions, and to Judge M. M. Milligan of Richmond, Missouri, and Mr. M. J. Henderson of the Kansas City Bar for valuable assistance during the four years the work has been in course of preparation.

St. Joseph, Mo.  
November, 1918.

M. G. ROBERTS.





# TABLE OF CONTENTS

---

## VOLUME I.

### PART ONE

#### FEDERAL AND STATE CONTROL OVER COMMON CARRIERS.

##### CHAPTER I.

##### THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

- Sec. 1. Congress Vested with Authority to Regulate All Interstate and Foreign Commerce.
- Sec. 2. Early Judicial Construction of the Commerce Clause—*Gibbons v. Ogden*.
- Sec. 3. Judicial Definitions of Term "Interstate Commerce" as Used in the Federal Constitution.
- Sec. 4. Transportation from one State to Another an Essential Element of Interstate Commerce.
- Sec. 5. Congressional Grant "to Regulate" Commerce Defined and Explained.
- Sec. 6. Importation of Legitimate Articles of Commerce from one State to Another Immune from State Legislation.
- Sec. 7. Commencement and Termination of Protection of the Commerce Clause.—Original Package Rule.
- Sec. 8. States may Forbid Introduction of or Exportation of all Articles not Legitimate Subjects of Trade and Commerce.
- Sec. 9. Statutory Exceptions Empowering States to Regulate Interstate Shipments of Intoxicating Liquors.

## CHAPTER II.

## RESPECTIVE POWERS OF THE STATES AND NATIONAL GOVERNMENT OVER INTERSTATE AND INTRASTATE CARRIERS.

- Sec. 10. Introductory.
- Sec. 11. General Principles Determining State and National Control Over Interstate Carriers and Transportation.
- Sec. 12. Foregoing Doctrines Illustrated and Applied to Divers Phases of Interstate Carriage and Transportation.
- Sec. 13. Federal Laws and Regulations Encroaching upon Powers of the States over Their Internal Affairs, Invalid.
- Sec. 14. Federal Regulation to be Valid Must Have Real or Substantial Connection with Interstate Commerce.
- Sec. 15. When Congressional Power may be Validly Exercised over Intrastate Subject Matters.
- Sec. 16. When Congress Legislates upon a Subject Matter of Commerce, State Laws Covering Same Field are Thereby Superseded.
- Sec. 17. Difficulty of Defining Field or Subject Matter Covered by Congressional Legislation.
- Sec. 18. Common Law Principles as Applied in State Courts Superseded as to Subject Matters Covered by Federal Statutes.
- Sec. 19. Power of States to Regulate Interstate Rates of Carriers Formerly Upheld by Supreme Court—The Granger Cases.
- Sec. 20. State Control Over and Power to Regulate Rates and Charges on Interstate Shipments Denied.
- Sec. 21. Passenger Fares for Interstate Journeys Prescribed by Municipal Ordinances and Accepted by Carriers Invalid.
- Sec. 22. Power of States over Intrastate Commerce as Broad and Exclusive as Control of Congress over Interstate Commerce.
- Sec. 23. States May Regulate and Fix Reasonable Rates for Intrastate Transportation.
- Sec. 24. Statutes of States Regulating Delivery of Cars for Interstate Shipment Inoperative.
- Sec. 25. States may Compel Switch Connections with Private Side Tracks for Intrastate Business.
- Sec. 26. State Statutes Prescribing Rates Specified in Bill of Lading Void as to Interstate by Valid as to Intrastate Shipments.
- Sec. 27. State Laws and Decisions Governing Liability for Loss and Damage to Property Superseded by Carmack Amendment.
- Sec. 28. State Statute Authorizing Issuance of Transportation in Payment for Advertising Invalid.
- Sec. 29. States May Require Operation of Trains Between Intrastate Points on Interstate Lines—Limitations and Exceptions.



- Sec. 30. State and Municipal Regulations Prescribing Speed, Signals and Stoppage of Interstate Trains.
- Sec. 31. Georgia "Blow-Post" Law Invalid, Being a Direct Burden upon Interstate Commerce.
- Sec. 32. States May Compel Carriers to Make and Maintain Track Connections for Interchange of Traffic.
- Sec. 33. Validity of State Laws Providing for "Full Crews" on Interstate Trains.
- Sec. 34. State Regulations or Charges for Transportation by Water.
- Sec. 35. Statutory Enactment of States Requiring Facilities and Appliances on Interstate Trains.
- Sec. 36. Power of States over Interstate Employers and Employees in Absence of Federal Legislation.
- Sec. 37. Interstate Messages by Telegraph Prior to Amendment of 1910 to Act to Regulate Commerce.
- Sec. 38. State Laws Regulating Interstate and Foreign Messages of Telegraph, Telephone, and Cable Companies, Invalid.
- Sec. 39. States May Not Regulate "Ticker Service" of Interstate Telegraph Companies.
- Sec. 40. State and Municipal Regulations of the Interstate Business of Express Companies.
- Sec. 41. Valid Municipal Regulations of Drivers on Streets Carrying Interstate Traffic.

## CHAPTER III.

## FEDERAL CONTROL OF CARRIERS DURING TIMES OF WAR.

- Sec. 42. Powers of Congress over Carriers during Times of Peace and War Distinguished.
- Sec. 43. President Empowered to Assume Control of Transportation Systems in Time of War.
- Sec. 44. Proclamation Assuming Control of Railroads Under Foregoing Provisions.
- Sec. 45. National Statute Providing for Federal Control and Compensation of Carriers During the Period of War with Germany.
- Sec. 46. Purpose of Congress in Enacting the Act Providing for Federal Control During War.
- Sec. 47. Effect of National Statute Providing for Federal Control upon other Laws, Federal and State.
- Sec. 48. President Authorized to Initiate Rates and Charges for Transportation During Period of Federal Control.
- Sec. 49. Actions at Law or Suits in Equity may be Brought by and Against Carriers under Federal Control.
- Sec. 50. Penalty for Violations of the Provisions of the Federal Control Act.
- Sec. 51. When Federal Control of Transportation System Under the Statute shall Terminate.

## PART TWO

DUTIES AND LIABILITIES OF COMMON CARRIERS TO SHIPPERS  
UNDER ALL FEDERAL INTERSTATE LAWS.

The Act to Regulate Commerce and  
Supplementary Legislation.

Carmack and Cummins Amendments.  
Federal Bill of Lading Law.

## CHAPTER IV.

THE ACT TO REGULATE COMMERCE AS ORIGINALLY ENACTED  
—ITS GENESIS, PURPOSE, GENERAL SCOPE  
AND VALIDITY.

- Sec. 52. Brief Historical Review of Federal Control over Carriers and Scope Thereof.
- Sec. 53. Causes Leading to Enactment of the Act to Regulate Commerce.
- Sec. 54. Principles of the Common Law Inadequate to Curb Evils of Railroad Operation.
- Sec. 55. Futile Attempts of the States to Regulate Charges for Interstate Transportation.
- Sec. 56. Effect of the Decision in *Wabash, St. L. & P. Ry. Co. v. Illinois*.
- Sec. 57. Power of Congress to Regulate the Duties of Carriers of Interstate Traffic.
- Sec. 58. First Step Towards Federal Regulation of Interstate Transportation by Rail—The Cullom Committee.
- Sec. 59. Report of Cullom Committee to Congress and Bill Recommended on January 18, 1886.
- Sec. 60. Fundamental Requirements of the Act to Regulate Commerce as Originally Enacted in 1887.
- Sec. 61. Purpose of Congress in Enacting Original Act to Regulate Interstate Commerce.
- Sec. 62. How the Interstate Commerce Act should be Construed and Interpreted.
- Sec. 63. Commission not Authorized Under Original Act of 1887 to Prescribe Rates for Transportation.

## CHAPTER V.

CHRONOLOGICAL REVIEW OF LEADING AMENDMENTS OF  
STATUTE.

- Sec. 64. Scope of the Chapter.
- Sec. 65. Amendments of 1889 and 1891 to the Interstate Commerce Act.
- Sec. 66. Invalid Provision of Section 12 Remedied by Passage of Compulsory Testimony Act of 1893.

- Sec. 67. Provisions Prohibiting Rebates and Discriminations Strengthened by Passage of Elkins Act of 1903.
- Sec. 68. Scope of Act and Powers of Commission Greatly Extended Through Amendments Incorporated by Hepburn Act of 1906.
- Sec. 69. Initial Carrier Liable for Loss and Damage on Lines of Connecting Carrier—Carmack Amendment.
- Sec. 70. Commission Empowered to Order Switch Connection with Private Side Tracks and Lateral Branch Lines.
- Sec. 71. Carriers Prohibited from Owning or Having an Interest in Freight Transported—the Commodity Clause.
- Sec. 72. Amendments Authorizing Commission to Prescribe Through Routes and Joint Rates.
- Sec. 73. Commission Authorized to Determine Allowances to Shippers for Services Rendered in Connection with Transportation.
- Sec. 74. Amendment of 1906 Prohibiting the Issuance and Giving of Free Passes—Persons Excepted.
- Sec. 75. Forms of All Accounts, Records and Memoranda Kept by Interstate Carriers Placed under Jurisdiction of Commission.
- Sec. 76. Amendments and Additions to the Statute by the Mann-Elkins Act of 1910.
- Sec. 77. Fraudulent Claims for Loss and Damage by Shippers Against Carriers Penalized.
- Sec. 78. Power Conferred upon Commission by 1910 Amendment to Suspend Proposed Changes in Rates.
- Sec. 79. The 1910 Amendment to the Long and Short Haul Provision.
- Sec. 80. Statutory Duty of Carriers to Route Interstate Freight as Directed by Shippers.
- Sec. 81. Carriers and Their Agents Prohibited from Giving Information Relating to Business of Interstate Shippers.
- Sec. 82. Extension of Jurisdiction of Commission over Water Carriers by Panama Canal Act of 1912.
- Sec. 83. Act of 1913 Requiring Commission to Ascertain Valuation of Property Owned or Used by all Interstate Carriers.
- Sec. 84. Amendment of 1917 Penalizing Persons for Obstructing Movement of Interstate Commerce During War.
- Sec. 85. President Authorized During War to Direct Movement of Commodities Essential to National Defense.

## CHAPTER VI.

## COMMON CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT.

- Sec. 86. The Statutory Provision.
- Sec. 87. Who are Common Carriers Within the Meaning of the Interstate Commerce Act.



- Sec. 88. Distinction Between Common Carriers and Plant Facilities—Industrial Railways.
- Sec. 89. All Carriers in Territories, District of Columbia and Alaska Included.
- Sec. 90. When Railroads Wholly Within Limits of Single State are Under Federal Control—Former and Present Rule.
- Sec. 91. Carriers Engaged in Transportation Between Points in United States and Adjacent Foreign Countries.
- Sec. 92. Carriers by Water Included as to Continuous Shipments Under Common Arrangements with Carriers by Rail.
- Sec. 93. Independent Ferry Companies Included as to Shipments Under Common Arrangement with Rail Carriers.
- Sec. 94. Common Control, Management, and Arrangement for Continuous Transportation, Defined and Explained.
- Sec. 95. Extension of Federal Jurisdiction Over Water Carriers by Panama Canal Act of 1912.
- Sec. 96. Amendment Applies to Traffic Between Two Points in United States Passing Through Panama Canal "or Otherwise."
- Sec. 97. Control or Ownership of Competitive Water Line by Rail Carrier Subject to Approval of Commission.
- Sec. 98. Policy of Congress in Adoption of That Part of Panama Canal Act Forbidding Ownership of Water Lines by Railroads.
- Sec. 99. Bridges and Bridge Companies Subject to Federal Act, When.
- Sec. 100. Street Railroads Crossing State Lines not Subject to Interstate Commerce Act.
- Sec. 101. Electric Interurban Railroads Engaged in Interstate Commerce Controlled by Statute.
- Sec. 102. Status of Terminal Railroads and Belt Lines Participating in Movement of Interstate Traffic.
- Sec. 103. Stock Yards Company Transferring Livestock Between its Pens and Tracks of Trunk Lines, a Common Carrier.
- Sec. 104. Status of Logging Roads as Interstate Carriers—the Tap Line Cases.
- Sec. 105. Private Car Lines not Common Carriers within Meaning of Act to Regulate Commerce.
- Sec. 106. Common Carriers of Oil and Other Commodities by Pipe Line Included.
- Sec. 107. Pipe Line Companies Transporting Solely Their Own Oil, Common Carriers, When.
- Sec. 108. Assumption of National Control over Interstate and Foreign Cable, Telephone and Telegraph Companies.
- Sec. 109. Independent Express Companies Included by Hepburn Amendment of 1906.
- Sec. 110. Sleeping Car Companies Placed Under Jurisdiction of Commission by Hepburn Act of 1906.
- Sec. 111. Receivers and Purchasers Pendente Lite.

- Sec. 112. Railroad Companies Incorporated in Foreign Countries and Engaged in Interstate Commerce.  
 Sec. 113. Statute Applies to Individuals and Partnerships as Well as Incorporated Companies.

## CHAPTER VII.

## SHIPMENTS AND TRANSPORTATION SERVICES CONTROLLED BY INTERSTATE COMMERCE ACT.

- Sec. 114. Constitutive Elements of Interstate Transportation Within the Act.  
 Sec. 115. Illustrative Applications of the Foregoing Principles in Adjudicated Cases.  
 Sec. 116. Shipments Between Two Points in Same State Passing En-route Through Another State.  
 Sec. 117. Absence of Definite Destination in Foreign Country or in Other State Immaterial.  
 Sec. 118. Change of Destination in Transit as Affecting Interstate Character of Shipment.  
 Sec. 119. Interstate Transportation Includes Receipt and Delivery of Traffic as Well as Actual Carriage.  
 Sec. 120. When Temporary Stoppage or Interruption Changes Interstate Character of Shipment into Intrastate and Vice Versa.  
 Sec. 121. When Interstate or Intrastate Character of a Shipment is not Changed by Temporary Stoppage or Interruption.  
 Sec. 122. Sale and Delivery of Coal f. o. b. Cars at Mine for Transportation to Purchasers Outside the State.  
 Sec. 123. Shipments from Points in One State to a Port of Transshipment in Same State for Export Included.  
 Sec. 124. Shipments from One Foreign Country to Another Through the United States Beyond Control of Commission.  
 Sec. 125. Regulation of Terminal Charges, Service and Facilities for Interstate Shipments.  
 Sec. 126. Transportation Wholly Within One State Not Under Federal Control.  
 Sec. 127. Transit Privileges Part of Transportation Under Control of Interstate Commerce Commission.  
 Sec. 128. Regulation of Grain Elevation Service Under Federal Control.  
 Sec. 129. Loading, Dunnage and Special Preparation of Freight Cars for Shipments of Particular Commodities.  
 Sec. 130. Weighing of Interstate Shipments of Freight Under Federal Control.  
 Sec. 131. Regulations and Rules Concerning Baggage of Interstate Passengers Under Control of Commission.  
 Sec. 132. Refrigeration, Ventilation and Icing of Property in Cars Part of Transportation Duties of Interstate Carriers.  
 Sec. 133. Track Storage and Demurrage Charges in Connection With

- Interstate Shipments Under Control of Commission.
- Sec. 134. Wharves and Connecting Tracks of Interstate Carriers Public Facilities Under Federal Control.
- Sec. 135. Jurisdiction of Commission Over Port Switching Service Performed on Import Traffic.
- Sec. 136. Interstate Transportation by Land of Explosives and Other Dangerous Articles Under Federal Control.
- Sec. 137. Peddling Merchandise from Cars not Transportation Service Which Carriers may be Compelled to Furnish.
- Sec. 138. Terms "Railroad" and "Transportation" Defined by Statute.
- Sec. 139. Statute not Applicable to all Interstate Commerce.

## CHAPTER VIII.

UNJUST DISCRIMINATIONS AND UNLAWFUL PREFERENCES  
BY INTERSTATE CARRIERS—GENERAL  
PRINCIPLES.

- Sec. 140. Statutory Definitions of Unjust Discriminations and Undue Preferences.
- Sec. 141. Unlawful Discriminations and Preferences Between Shippers Under the Common Law.
- Sec. 142. Origin and History of Sections Two and Three of the Interstate Commerce Act.
- Sec. 143. Purpose and Object of Congress in the Enactment of Sections Two and Three.
- Sec. 144. Relation and Distinction Between Sections Two and Three.
- Sec. 145. Distinction Between Section Two and Clause in Section One Prohibiting Unjust and Unreasonable Charges.
- Sec. 146. Statutory Conditions Rendered Difference in Charges Unlawful Under Section Two.
- Sec. 147. Circumstances and Conditions Determining Dissimilarity of Service Under Section 2 Refer Strictly to Matters of Carriage.
- Sec. 148. Unjust Discrimination and Preference Sections of Original Act Apply to Subsequent Amendments Defining Railroads and Transportation.
- Sec. 149. Distinction Between Ordinary Definition of Rebate and the Meaning of That Term Under Provisions of Section Two.
- Sec. 150. Discrimination Under Section 3 Must Ordinarily be Prejudicial to One Party and Source of Advantage of the Other.
- Sec. 151. Relation of Discrimination Clause to the Elkins Act of 1903.
- Sec. 152. All Methods and Means Employed Unlawful if Ultimate Results Thereof Cause Unjust Discriminations.
- Sec. 153. Effect of Statute Upon Contracts with Discriminatory Provisions.



- Sec. 154. Terms "Unreasonable" or "Undue" Imply Comparison of all Facts and Circumstances Applicable.
- Sec. 155. Existence of Undue Preference or Unjust Discrimination a Question of Fact.
- Sec. 156. Strict Uniformity Not Always Required.
- Sec. 157. Long Existence of Undue Discrimination No Justification for its Continuance.
- Sec. 158. Prohibition Against Unjust Discrimination Covers Judgments by Consent and Waiver of Valid Defenses.
- Sec. 159. Proof of Injury and Measure of Damages in Actions for Unlawful Discrimination.

## CHAPTER IX.

## DISCRIMINATIONS BETWEEN SHIPPERS AS TO RATES, SERVICES, FACILITIES AND ALLOWANCES.

- Sec. 160. Carrier Must Deal with All Its Shippers on Absolute Equality and Must Afford Equal Facilities.
- Sec. 161. Difference in Rates When Based Upon Difference in Service Not Discriminatory.
- Sec. 162. Different Rates for Wholesalers and Retailers Prohibited.
- Sec. 163. Rates for Train Loads Lower Than for Single Car Loads Subject Small Shippers to Undue Disadvantage.
- Sec. 164. Higher Rates on Domestic Than on Export Traffic Between Ports of Entry and Inland Points not Discriminatory.
- Sec. 165. Doctrine of Import Case Applied and Illustrated.
- Sec. 166. Use of Terminal Facilities by Permitting Interchange of Traffic with one Carrier and Denying it to Another.
- Sec. 167. Discrimination in Reserving Right to Route Through Shipments Beyond Carrier's Terminal—Former and Present Rule.
- Sec. 168. Discrimination in Refusal of Rail Carriers to Establish Through Routes and Joint Rates with Water Lines.
- Sec. 169. Exclusive Privileges for Auxiliary Facilities at Stations and Terminal Grounds Lawful.
- Sec. 170. Distribution of Cars Among Shippers During Time of Shortage Must be Free from Discrimination.
- Sec. 171. Preferences and Discriminations in Demurrage and Track Storage Charges.
- Sec. 172. Unreasonable Compensation to Shippers for Services in Connection with Transportation.
- Sec. 173. Abnormal Division of Joint Rates to Carrier Unlawful.
- Sec. 174. Undue Discriminations in Divisions of Joint Through Rates to Tap Lines or Logging Roads.
- Sec. 175. Grant of Wharfage Privileges to One Shipper Denied to Others Unlawful.
- Sec. 176. Unlawful Discriminations and Preferences in Transit Privileges.

- Sec. 177. Compensation for Transit Privileges Not Limited to Actual Cost.
- Sec. 178. Extension of Transit Privilege Over Twelve Months Unreasonable—Exceptions Permitted.
- Sec. 179. Carriers May Allow Compensation to One Shipper for Transportation Services and Deny Same Privilege to Another.
- Sec. 180. Contracts Requiring Expedited Services Not Open to All Shippers Invalid.
- Sec. 181. Preferential Rates to Other Carriers as Shippers Prohibited.
- Sec. 182. Foregoing Rules Illustrated and Applied.
- Sec. 183. Storage Regulations Must Be Enforced Without Preference or Discrimination.
- Sec. 184. Haulage by Stage or Wagon from Destination Points not a Dissimilar Circumstance Justifying Lower Rates.
- Sec. 185. Preparing Cars for Shipment of Commodities for Some Shippers and Refusing Same Service to Others.
- Sec. 186. Grain Elevator Service Must be Open to All Shippers Without Preference.
- Sec. 187. Allowances When Owner of Elevator is Shipper of Grain—Former and Present Rule.
- Sec. 188. Allowances for Lighterage Services to Shipper Within Free Delivery Zone not Discriminatory as to Shipper Beyond Zone.
- Sec. 189. Rebating Part of Freight Rates in Payment for Land for Right of Way.
- Sec. 190. Assisting One Shipper to Collect Private Charges and Refusing Same Service to Another.
- Sec. 191. Discrimination in Demanding Cash Payment of Some Shippers and Extending Credit to Others—Conflicting Decisions.
- Sec. 192. Deduction from Freight Rates to Pay Shipper for Building Tie Hoist Invalid.
- Sec. 193. Difference in Rates on Freight Not Justified by Different Methods of Loading.
- Sec. 194. Carrier "Spotting" Cars for One Shipper and Refusing Same Service to Another Similarly Situated.
- Sec. 195. Trap Car Service Not Unlawful If Practiced Without Discrimination.

## CHAPTER X.

UNLAWFUL PREFERENCES IN RATES AND PRACTICES  
BETWEEN CITIES, COMMUNITIES AND LOCALITIES.

- Sec. 196. Preferences Between Cities and Localities Under the Common Law Not Forbidden.
- Sec. 197. Equality Between Communities under Similar Circumstances and Conditions Required.
- Sec. 198. When Higher Rates to One Point Than to Another are Unjustly Discriminatory.

- Sec. 199. All Localities Entitled to Non-Discriminatory Rates.
- Sec. 200. Undue Prejudice Between Localities Resulting from Different Interstate and Intrastate Rates—Shreveport Case.
- Sec. 201. Every City and Locality Entitled to Benefit of Natural Advantages.
- Sec. 202. Rates to One Locality Per Se Reasonable, Unlawful if Another Locality is Prejudiced Thereby.
- Sec. 203. Basing Point System of Rate-Making Legal but Subject to Control of Commission.
- Sec. 204. Discriminations and Preferences Produced by Competition Between Localities not Undue or Unreasonable.
- Sec. 205. Limitation Upon Competition in Determining Whether Discrimination is Unjust or Preference Undue.
- Sec. 206. Difference in Amount of Traffic Between Localities Similarly Situated no Justification for Discriminatory Rates and Fares.
- Sec. 207. Carrier not Guilty of Discrimination Between Localities When it Does not Participate in Rates to Favored Point.
- Sec. 208. Discrimination Between Different Coal Fields Served by Different Carriers not Unlawful.
- Sec. 209. Discrimination in the Establishment and Maintenance of Group Rates.
- Sec. 210. Different Rates in Opposite Directions Over Same Lines Not Discriminatory.
- Sec. 211. Discrimination in Absorbing Switching Charges at One Point and Refusing at Another.
- Sec. 212. Discrimination Through Joint Rates Between Two Localities Similarly Situated Prohibited, When.
- Sec. 213. Differentials Between Atlantic Coast Cities Legitimately Based upon Competitive Relations.
- Sec. 214. Maintaining Higher Rates on Branch Line Parallel to Main Line Serving Same Territory.
- Sec. 215. Proportional Part of Through Rate Lower Than Local Rates Between Same Points Not Discriminatory.
- Sec. 216. Rebilling and Reshipping Privilege at Nashville on Grain From Ohio River to Southeastern Points Discriminatory.
- Sec. 217. Differential Between Cities on Opposite Banks of Rivers Crossed by Expensive Bridges.
- Sec. 218. Carriers Unduly Favoring Industries on Their Own Lines as Against Competitors on Other Lines.
- Sec. 219. Stopping Carload Shipments at Points En Route to Finish Loading Discriminatory, When.

## CHAPTER XI.

## UNLAWFUL PREFERENCE OR ADVANTAGE TO PARTICULAR KINDS OF TRAFFIC.

- Sec. 220. Unreasonable Preferences to any Particular Description of Traffic.



- Sec. 221. Passage of Statute Prohibiting Discriminations Stimulated Movement for a More Uniform Classification.
- Sec. 222. Duty of Commission When Classification is Used to Effect Unjust Discrimination.
- Sec. 223. Controlling Considerations in Making Classifications of Freight.
- Sec. 224. Discriminations and Preferences in the Classification of Commodities.
- Sec. 225. Differential Between Raw Material and Manufactured Products—Grain and Flour, Livestock and Meats, Etc.
- Sec. 226. Differential between Carload and Less than Carload Rates Lawful.
- Sec. 227. Relation Between Carload and Less Than Carload Rates Must not be Excessive.
- Sec. 228. Application of Carload Rates to Carload Lots when Goods Belong to Several Owners.
- Sec. 229. Wheat and Coarse Grain Not "Like Traffic" Requiring Same Rate.
- Sec. 230. Different Uses to which Commodity is Put, No Justification for Different Rates.
- Sec. 231. Justifiable Discrimination Between Shipments of Oil in Barrels and in Tank Cars.
- Sec. 232. Relationship of Rates on Lumber and Lumber Products Must be Free From Discrimination.
- Sec. 233. Differentials Between Similar Commodities Justified by Different Conditions and Circumstances Affecting Transportation—Lumber and Logs.
- Sec. 234. Lower Rates on Returned Shipments Illegal Except When Refused by Consignees.

#### CHAPTER XII.

#### UNJUST DISCRIMINATION AND UNLAWFUL PREFERENCE IN PASSENGER SERVICE.

- Sec. 235. Federal Statute Includes Passenger as Well as Freight Transportation.
- Sec. 236. Carrying Personal Baggage of Passengers Free Not Undue Discrimination.
- Sec. 237. Collection of Additional Fare on Trains From Passengers Without Tickets not Unlawful.
- Sec. 238. Discrimination Between White and Colored Passenger Unlawful.
- Sec. 239. Lower Rates to Settlers Unlawful.
- Sec. 240. Control of Commission over Preference in Mileage, Excursion and Commutation Passenger Tickets.
- Sec. 241. Legality of Sale of Tickets for Number of Persons at Less Rate Than for a Single Passenger—Party Rate Case.
- Sec. 242. But Party Rate Tickets Cannot be Limited to Particular Classes of Persons.

- Sec. 243. Distinction Between Wholesale Rates in Passenger and Freight Traffic.
- Sec. 244. Regulations Governing Commutation Tickets Must Not be Discriminative Between Classes of Persons.
- Sec. 245. Discrimination in Trans-Continental Passenger Fares as Affecting Intermediate Localities.

## CHAPTER XIII.

## FILING AND PUBLICATION OF INTERSTATE RATES, AND EFFECT THEREOF.

- Sec. 246. Publicity and Permanency of Rates and Charges of Common Carriers at Common Law.
- Sec. 247. Publication, Certainty and Stability of Rates Necessary to Eliminate Rebates and Discriminations.
- Sec. 248. The Act to Regulate Commerce on Publicity of Rates and Adherence Thereto.
- Sec. 249. Purpose of Congress in the Passage of the Provisions of Section 6 of the Act.
- Sec. 250. Publication and Filing of all Rates, Fares and Charges for Interstate Transportation Mandatory.
- Sec. 251. Necessary Steps to Put Rates Legally in Force—Posting not Essential.
- Sec. 252. What the Schedules of Rates, Fares and Charges Filed with the Commission Must Contain.
- Sec. 253. Privileges or Facilities Furnished Shippers and Not Specified in Tariffs Unlawful.
- Sec. 254. Regulations Concerning Baggage of Interstate Passengers Must be Published.
- Sec. 255. Demurrage Charges on Interstate Shipments Must be Filed with Commission.
- Sec. 256. No Changes in Rates, Fares and Charges Permitted Without Thirty Days Notice to the Commission.
- Sec. 257. Carriers Prohibited from Departing to any Extent from Published Schedules of Rates and Charges Filed With Commission.
- Sec. 258. Foregoing Rule Equally Applicable to Transit and Special Services Provided in Tariffs.
- Sec. 259. Forwarders are Shippers within Statute Prohibiting Refunds from Published Rates and Charges.
- Sec. 260. Oral Contracts or Special Arrangements for Interstate Transportation Contravening Published Schedules, Unlawful.
- Sec. 261. Shippers and Passengers Conclusively Presumed to Have Knowledge of Published Schedules of Rates, Fares and Charges.
- Sec. 262. Courts Bound by Published Rates and Charges Until Set Aside by Commission.
- Sec. 263. Carriers Must Collect the Scheduled Rates and Charges for Interstate Transportation.

- Sec. 264. Illustrative Cases Wherein the Foregoing Rule was Applied and Enforced.
- Sec. 265. Defense of Estoppel to Actions Against Shippers for Undercharges.
- Sec. 266. Penalty for Making Erroneous Quotation of Rate When Shipper is Damaged Thereby.
- Sec. 267. In Actions to Collect Scheduled Rates Counterclaims for Damages to Goods Prohibited.
- Sec. 268. Damages Not Recoverable for Failure to Post Rates at Stations.
- Sec. 269. Rule Stated in Foregoing Paragraph Illustrated in Adjudicated Cases.
- Sec. 270. Shipper May Recover Damages for Collection of Rate in Excess of that Fixed by Schedule.
- Sec. 271. Nothing but Money May be Lawfully Received for Transportation of Either Passengers or Property.
- Sec. 272. Acceptance of Promissory Notes in Payment for Freight Charges Unlawful.
- Sec. 273. Separately Established Rates must be Published in Absence of Joint Rates over Through Route.
- Sec. 274. When Through Rate is Made up of Sum of Locals, Rates in Effect on Date of Shipment Apply.
- Sec. 275. Departures from Published Tariffs Permitted in Performance of Private Duties of Carriers.
- Sec. 276. Rates for Passage of Vehicles on Railroad Ferries Must be Filed.

## CHAPTER XIV.

DAMAGES OR REPARATION FOR VIOLATIONS OF COMMERCE  
ACT—JURISDICTION OF COURTS AND COM-  
MISSION.

- Sec. 277. Statutory Provision Creating Civil Liability for Damages Due to Violation of Interstate Commerce Act.
- Sec. 278. Statutory Authority of Commission and Courts to Award Damages for Violation of Act.
- Sec. 279. Commission Without Authority to Award Damages Prior to Amendment of 1889.
- Sec. 280. Award of Damages by Commission for Unlawful Discrimination—Former and Present Rule.
- Sec. 281. Authority of Commission to Award Damages Extends Only to Violations of Act to Regulate Commerce.
- Sec. 282. Conflicting Provisions Harmonized and Exclusiveness of Remedy before Commission, in Certain Cases, Established.
- Sec. 283. Courts Without Primary Jurisdiction to Award Damages for Exaction of Excessive Interstate Rates.
- Sec. 284. But Actions for Overcharges Exceeding Scheduled Rates may be Prosecuted in Courts without Previous Determination of Commission.



- Sec. 285. Suits for Damages Recoverable Under Section 8 Cannot be Prosecuted in State Courts.
- Sec. 286. Damages Caused by Unjust Discrimination, Preliminary Order of Commission Essential, When.
- Sec. 287. Original Jurisdiction of State Courts to Award Damages Against Interstate Carriers not Wholly Superseded.
- Sec. 288. In Actions for Damages for Violation of Statute Pecuniary Loss Must be Shown.
- Sec. 289. Measure of Damages for Unreasonable Rates and Unlawful Discriminations.
- Sec. 290. Parties Entitled to Damages for Excessive Freight Charges—Consignors and Consignees.
- Sec. 291. Right of Shipper to Reparation When Arbitrary Sum is Added to Sale Price to Cover Excessive Charges.
- Sec. 292. Foregoing Principle Approved by Federal Supreme Court—*Southern P. Co. v. Darnell-Taenzer Lumber Co.*
- Sec. 293. Reparation on Past Shipments not Automatically Awarded on Finding that Rate is Excessive.
- Sec. 294. Damages Growing out of Inadequate Service or Facilities.
- Sec. 295. Damages for Misrouting Shipments May be Awarded by Commission, When.
- Sec. 296. Reparation Awarded by Commission for Overcharges a Bar to Subsequent Action for Additional Damages.
- Sec. 297. Findings of Commission on Reasonableness of Rates Inure to Benefit of Every Person Paying the Unjust Rate.
- Sec. 298. Findings of Fact Required When Commission Awards Damages Against a Carrier.
- Sec. 299. Statute Prescribing Findings and Orders of Commission Prima Facie Evidence of Facts Therein Stated, Constitutional.
- Sec. 300. Commission May Order Reparation without Prescribing Maximum Rate to be Observed in the Future.
- Sec. 301. Actions to Enforce Orders of Commission Awarding Damages may be Prosecuted in State as well as Federal Courts.
- Sec. 302. Complaints for Damages before Commission must be Filed within Two Years.
- Sec. 303. Assignability of Claims for Damages under the Interstate Commerce Act.
- Sec. 304. Allowance of Attorney's Fees for Services in Reparation Cases Before Commission not Permitted.

## CHAPTER XV.

## LIABILITIES FOR LOSS AND DAMAGE TO INTERSTATE SHIPMENTS—CARMACK AMENDMENT.

- Sec. 305. Initial Carriers Liable for Loss and Damage to Property Moving in Interstate Commerce.
- Sec. 306. Constitutionality and Validity of the Carmack Amendment.

- Sec. 307. Law Governing Duties of Carriers for Loss or Damage to Interstate Shipments Prior to 1906.
- Sec. 308. Purpose of Congress in the Enactment of the Carmack Amendment.
- Sec. 309. Stipulations Exempting Initial Carrier from Liability for Loss and Damage on Connecting Lines Invalid.
- Sec. 310. All State Laws and Rules Regulating Liabilities for Loss and Damage, Superseded as to Interstate Shipments.
- Sec. 311. Decisions of Federal Courts Control in Construing Carmack Amendment.
- Sec. 312. State Courts may Enforce Provisions of Carmack Amendment and Award Damages Thereunder.
- Sec. 313. Actions Brought in State Courts under Carmack Amendment not Removable, When.
- Sec. 314. Initial Carrier may not be Sued in Domicile of Terminal Carrier.
- Sec. 315. Receipt from Shipper of Money Paid by Initial Carrier Binding upon Connecting Carrier in Absence of Fraud.
- Sec. 316. Recovery Against Initial Carrier Bars an Action Against Connecting Carriers.

#### CHAPTER XVI.

##### THE CARMACK AMENDMENT AS MODIFIED BY FIRST AND SECOND CUMMINS AMENDMENTS.

- Sec. 317. Text of the Carmack Amendment as Modified by First and Second Cummins Amendments.
- Sec. 318. Causes Leading to Enactment of First Cummins Amendment —Agreed Valuation Clauses and Notices of Loss.
- Sec. 319. Effect of Second Amendment upon Provisions of First Cummins Amendment.
- Sec. 320. Object and Purpose of Congress in Enacting Second Cummins Amendment of 1916.
- Sec. 321. Cummins Amendment has no Retroactive Effect.
- Sec. 322. Initial Carriers Subject to the Statute as Changed by Cummins Amendment.
- Sec. 323. Interurban Electric Railroad Subject to Statute, When.
- Sec. 324. Carriers Liable for Full Actual Loss, Damage or Injury to Ordinary Live Stock.
- Sec. 325. Limitations of Liability Valid as to Property Other Than Live Stock, When.
- Sec. 326. Stipulations as to Notice of Claims and Limitations upon Filing of Suits Now Regulated by Statute.
- Sec. 327. Statute not Applicable to Export and Import Shipments to and from Countries not Adjacent to United States.

## CHAPTER XVII.

BASIS, NATURE AND EXTENT OF LIABILITY UNDER CARMACK  
AMENDMENT AS AMENDED.

- Ses. 328. Liability Imposed by the Statute is that of Common Law Doctrines Governing Duties of Carriers.
- Sec. 329. Ancient Common Law and Modern Exceptions to Liabilities of Common Carriers.
- Sec. 330. Interstate Carriers may Contract Against Loss by Fire not Due to Negligence.
- Sec. 330a. Stipulations Exonerating Carrier from its Own Negligence Invalid Though Filed with Commission.
- Sec. 331. Proviso Reserving all Remedies under Existing Laws Relates Solely to Remedies under Federal Laws.
- Sec. 332. Duties and Obligations of Initial Carrier Commence with Delivery of Property for Transportation.
- Sec. 333. Effect of Failure or Refusal of Initial Carrier to Issue Bill of Lading.
- Sec. 334. Term "Lawful Holder" of Bill of Lading not Limited to Owner of Property Transported.
- Sec. 335. Bill of Lading Issued by Initial Carrier Governs Entire Transportation—Second Bill Void.
- Sec. 336. Statute Embraces Damages due to Delay as Well as for Loss or Injury in Course of Transportation.
- Sec. 337. Wrongful Delivery by a Terminal Carrier a "Loss" Within Meaning of Statute.
- Sec. 338. Initial Carriers Liable for Property Held by Terminal Carrier as Warehouseman—Conflicting Decisions.
- Sec. 339. Nature of Carrier's Liability as Warehouseman.
- Sec. 340. Quantum of Proof Necessary to Establish Liability under Federal Statute.
- Sec. 341. Federal Rule as to Negligent Delay Co-operating with Act of God in Destruction of Property.
- Sec. 342. Connecting and Terminal Carriers Liable Under Carmack Amendment as Amended, When.
- Sec. 343. Connecting and Terminal Carriers not Liable for Acts of Initial Carrier.
- Sec. 344. Presumption that Loss or Damage Occurred on Line of Terminal Carrier—Contrary Rulings.
- Sec. 345. Last Carrier not Liable in Absence of Proof of Damage on its Line.
- Sec. 346. Effect of Re-routing or Change of Destination upon Liability of Initial Carrier.
- Sec. 347. Carriers May Limit Liability for Value of Property at Time and Place of Shipment.
- Sec. 348. Provisions of Shipper's Contract with Initial Carrier Inure to Benefit of Connecting Carrier.



## CHAPTER XVIII.

## THE FEDERAL BILL OF LADING LAW.

- Sec. 349. Origin and General Scope of the Federal Bill of Lading Law.
- Sec. 350. Constitutionality and Validity of the Act.
- Sec. 351. Leading Provisions of Act—Rule in *Friedlander v. Texas & Pacific R. Co.*, Modified.

## CHAPTER XIX.

## THE INTERSTATE COMMERCE COMMISSION—ITS NATURE, FUNCTIONS, POWERS AND DUTIES.

- Sec. 352. Necessity of a National Commission to Enforce Federal Legislation Regulating Railroads.
- Sec. 353. Statutory Provision Creating the Interstate Commerce Commission.
- Sec. 354. Amendments of 1906 and 1917 Increasing Membership and Salaries of the Commissioners.
- Sec. 355. Commission an Administrative Body Exercising Quasi Judicial Functions.
- Sec. 356. General Statement of Powers and Duties of Commission over Interstate Carriers.
- Sec. 357. Commission Authorized to Divide its Members into Divisions.
- Sec. 358. Three Divisions of Commission Established Pursuant to Foregoing Amendment.
- Sec. 359. Limitation upon Powers of Commission in Regulating Interstate Carriers and Transportation.
- Sec. 360. Commission Without Authority to Compel Carriers to Acquire and Furnish Special Kind of Cars.
- Sec. 361. Duty to Furnish Cars for Interstate Shipments a Judicial Question for Courts and not Administrative in Character.
- Sec. 362. Maximum Rates and Charges for Interstate Transportation may be Prescribed by Commission.
- Sec. 363. Proposed Advances in Rates may be Suspended by Commission Pending Investigation of Propriety.
- Sec. 364. Amendment of 1917 Prohibiting Filing of Increased Rates without Approval of Commission.
- Sec. 365. Rules of Carriers Governing Distribution, Exchange, Interchange and Return of Cars.
- Sec. 366. Statute Compelling Carriers to Establish Through Routes and Joint Rates upon Order of Commission, Valid.
- Sec. 367. Powers of, and Limitations Upon, Commission in Establishing Through Routes and Joint Rates.
- Sec. 368. When Commission may Establish Through Routes and Maximum Joint Rates between Rail and Water Lines.
- Sec. 369. Jurisdiction of Commission in Connection with Transportation to Adjacent Foreign Countries.

- Sec. 370. Commission may not Compel a Carrier to Receive and Switch Carload Freight to Industries on its Terminals.
- Sec. 371. Commission may Authorize Carriers to Charge Less for Longer than for Shorter Distance.
- Sec. 372. Commission may Authorize Rail Carriers to Continue Ownership of Water Lines.
- Sec. 373. Commission may Prescribe the Forms of all Schedules of Rates and Charges.
- Sec. 374. Charges by Shippers against Carriers for Services Connected with Transportation under Control of Commission.
- Sec. 375. Commission may Formulate Regulations for the Transportation of Explosives.
- Sec. 376. Switch Connections may be Ordered by the Commission, When.
- Sec. 377. Forms of all Accounts, Records and Memoranda of Carriers Subject to Control of Commission.
- Sec. 378. Power of Commission over Rail Carriers Discriminating against Steamship Lines to Foreign Countries.
- Sec. 379. Rail Rates Reduced to Meet Water Competition may not be Raised without Permission of Commission.
- Sec. 380. Physical Connection between Line of Rail Carriers and Water Carriers may be Established by Commission.
- Sec. 381. Maximum Proportional Rates by Rail to and From Ports may be Established by Commission, When.
- Sec. 382. Commission Without Jurisdiction to Regulate Charges in Connection with 28-Hour Livestock Law.
- Sec. 383. Commission Required to Make Annual Reports to Congress.
- Sec. 384. Rules and Regulations for Inspection of Locomotive Boilers Controlled by Commission.
- Sec. 385. Carriers Required to Make Monthly Reports of all Accidents to Commission.
- Sec. 386. Commission May Require Annual Reports from all Common Carriers Subject to Statute.
- Sec. 387. Power of Commission over Safety Appliances on Railroad Cars and Engines.
- Sec. 388. Commission Empowered to Investigate Railroad Accidents to Make Reports.

## CHAPTER XX.

## PROCEDURE BEFORE INTERSTATE COMMERCE COMMISSION.

- Sec. 389. Who May Make Complaints to the Commission.
- Sec. 390. Absence of Direct Damage to Complainant not Ground for Dismissal of Complaint.
- Sec. 391. Power of Commission to Proceed when Acting upon its Own Motion.
- Sec. 392. Power of Commission to Formulate Rules of Procedure.
- Sec. 393. Rules Governing Complaints Filed Before Commission.
- Sec. 394. Essentials of Complaints When Reparation is Sought.

- Sec. 395. Formal Claims for Reparation Based upon Findings of Commission.
- Sec. 396. Specifications of Complaints, Answers, Briefs, Petitions, Applications, etc.
- Sec. 397. Applications to Carriers Under Fourth Section.
- Sec. 398. Suspensions of Tariff Schedules under Section 15.
- Sec. 399. Requirements of the Rules as to Answers Filed Before Commission.
- Sec. 400. Method of Serving Papers.
- Sec. 401. Amendments to Complaints or Answers in Proceedings Before Commission.
- Sec. 402. Commission May Order Testimony to be Taken by Deposition at any Stage of Proceedings.
- Sec. 403. Method of Hearing Before the Commission.
- Sec. 404. May Hold Hearings or Prosecute Inquiries Anywhere in the United States.
- Sec. 405. Continuances, Extensions of Time and Stipulations.
- Sec. 406. Commission may Compel Attendance and Testimony of Witnesses and Production of Papers.
- Sec. 407. Schedules, Contracts and Annual Reports Filed with Commission—Public Records Receivable as Prima Facie Evidence, When.
- Sec. 408. Transcripts of Testimony to be Furnished Complainant and Defendant.
- Sec. 409. Rules Governing Filing of Briefs.
- Sec. 410. Orders of the Commission—Enforcement, Service of, and Duties of Carriers Thereunder.
- Sec. 411. Applications for Rehearing or Reopening before the Commission—Procedure.
- Sec. 412. Employment of Attorneys to Aid Commission Authorized.

---

### PART THREE

#### PERSONAL INJURIES TO INTERSTATE EMPLOYEES OF COMMON CARRIERS.

##### The Federal Employers' Liability Act.

#### CHAPTER XXI.

##### SCOPE, PURPOSE, VALIDITY AND EFFECT OF FEDERAL LIABILITY ACT.

- Sec. 413. Source, Nature and Extent of Power of Congress to Regulate Relation of Master and Servant.
- Sec. 414. Employers' Liability Act of 1906 Invalid.
- Sec. 415. Second Federal Employers' Liability Act Valid.
- Sec. 416. Scope of the Federal Employers' Liability Act.



- Sec. 417. Purpose of Congress in Enactment of Federal Act—Uniformity and Modification of Common Law Rules.
- Sec. 418. Defects in Act of 1908 and Amendments of 1910.
- Sec. 419. Congressional Purpose in the Enactment of the Amendments of 1910.
- Sec. 420. Extent of Power Exercised by Congress in Passing the Liability Act.
- Sec. 421. Exclusiveness of the Federal Act and its Effect upon State Laws.
- Sec. 422. State Workmen's Compensation Laws Superseded by Federal Act as to Injuries Arising in Interstate Commerce.
- Sec. 423. Common Law Right of Parents to Recover for Loss of Service of Minor Employee Injured, Superseded.
- Sec. 424. Remedy Provided by Statute Limited to Employees Only of Common Carriers by Railroad.
- Sec. 425. Employees on Ocean-going Ships Owned by Common Carriers by Railroads not Included.
- Sec. 426. Decisions of National Courts Construing Act Control.
- Sec. 427. Laws of State Control as to Procedure.
- Sec. 428. Fellow Servant Rule Abolished as to all Interstate Employees.

## CHAPTER XXII.

## CARRIERS SUBJECT TO LIABILITY ACT.

- Sec. 429. General Rule as to When Railroad Companies are Engaged in Interstate and Foreign Commerce.
- Sec. 430. Railroads Within the Act Defined—Spur Tracks.
- Sec. 431. Railroad Must be a Common Carrier—Tap Lines and Logging Roads.
- Sec. 432. Carriers Owning and Operating Lines Wholly Within a Single State Subject to Federal Act, When.
- Sec. 433. Railroad Carriers Engaged in Foreign Commerce Subject to the Statute.
- Sec. 434. Lessor of Railroad Engaged in Interstate Commerce Liable, When.
- Sec. 435. Interurban Electric Railroads Included Within the Act.
- Sec. 436. Railroads Carrying Passengers and no Freight.
- Sec. 437. Ships or Vessels not a Part of a Railroad System.
- Sec. 438. Street Railroads not Within the Terms of the National Act.
- Sec. 439. Receivers of Railroad Corporations Included Within the Act.
- Sec. 440. Sleeping Car Companies not Common Carriers by Railroad.
- Sec. 441. Express Companies not Common Carriers by Railroad Under Federal Act.
- Sec. 442. All Carriers by Railroad and all their Employees Within Territories Included.
- Sec. 443. Beginning and Ending of Interstate Character of Shipments.
- Sec. 444. Hauling Empty Cars or Company Property over State Line.
- Sec. 445. Transportation from Point to Point in One State Passing Through Another State in Transit.

- Sec. 446. When Reshipment from Point of Delivery Changes Interstate Character of Traffic.
- Sec. 447. When Reshipment from Point of Delivery Does not Change Interstate Character of Traffic.
- Sec. 448. Proof that Injured Servant is Employed in Interstate Commerce Sufficient to show that the Railroad is so Engaged.

## CHAPTER XXIII.

## EMPLOYEES ENGAGED IN INTERSTATE COMMERCE—GENERAL PRINCIPLES.

- Sec. 449. Statute Includes Only Employees Injured While Engaged in Interstate Commerce.
- Sec. 450. Employment in Interstate Commerce not Restricted or Limited to Actual Transportation from One State to Another.
- Sec. 451. Same Act May Constitute Interstate Employment in One Relation and not in Another.
- Sec. 452. Criterion Adopted by United States Supreme Court in Determining Employment in Interstate Commerce.
- Sec. 453. Employees Presumed to be Engaged in Intrastate Commerce.
- Sec. 454. Prior or Subsequent Employment Immaterial in Determining Applicability of Federal Statute.
- Sec. 455. Servants Employed in Both Intrastate and Interstate Commerce.
- Sec. 456. Employees on Premises of Railroad Company Going to or from Work.
- Sec. 457. Status of Employees Injured While Going to or from Day's Work Partly in Interstate and Partly in State Commerce.
- Sec. 458. Employer not Liable to Employee Injured After Day's Work is Over—Sleeping in Cars.
- Sec. 459. Effect of Temporary Cessation in or Abandonment of Work in Interstate Commerce.
- Sec. 460. Employees of Private Carriers Transporting their Own Property not Subject to Statute.
- Sec. 461. When Questions of Employment in Interstate Commerce should be Submitted to Jury.
- Sec. 462. Decisions Construing Federal Safety Appliance Act not always Applicable in Construing Employers' Liability Act.
- Sec. 463. Instances where Employees were Engaged in Interstate Commerce but Erroneously Held to Have Been Engaged in Intrastate Commerce.
- Sec. 464. Instances Where Employees Were Engaged Exclusively in Intrastate Commerce but Erroneously Held to have been Engaged in Interstate Commerce.
- Sec. 465. Burden of Proving Interstate Employment is Upon the Plaintiff.
- Sec. 466. Burden of Proving Interstate Employment upon Defendant, When.

## CHAPTER XXIV.

## EMPLOYES ENGAGED IN CONSTRUCTION AND REPAIR WORK.

- Sec. 467. Employees Engaged in Construction of Instrumentalities for Future Use in Interstate Commerce.
- Sec. 468. Distinction between Original Construction Work and Repair or Maintenance of Interstate Highways by Rail.
- Sec. 469. Bridge Workers and Carpenters Employed in Interstate Commerce, When.
- Sec. 470. Far Reaching Effect of Pedersen Case in Extending National Control over Railroad Employees.
- Sec. 471. Erecting Foundation for New Bridges under Old Bridges Forming Parts of Interstate Lines.
- Sec. 472. Removing Bolts from Timbers after Having Been Taken Out of Interstate Bridges.
- Sec. 473. Repairing Tracks of Interstate Carriers—Section men and Track Laborers.
- Sec. 474. Status of Laborers Repairing Side Tracks, Spur Tracks and Switches.
- Sec. 475. Maintenance and Repair of Turntables on Interstate Railroads.
- Sec. 476. Clearing Debris from Interstate Lines after Wrecks and Constructing Temporary Tracks.
- Sec. 477. Employees Surveying Track to Improve Condition of Road-bed.
- Sec. 478. Employees Handling Rails on Tracks of Interstate Carriers.
- Sec. 479. Picking up Old Rails and Storing New Ones Along Track for Future Use.
- Sec. 480. When Laborers Handling Ties for Common Carriers are Under the Federal Act.
- Sec. 481. Employees Handling Ballast, Gravel, Sand, Etc., for Use in Repairing Interstate Tracks.
- Sec. 482. Excavating and Deepening Ditches Along Railroad Tracks for Drainage Purposes.
- Sec. 483. Repairing or Rebuilding Depots, Roundhouses, Sheds, etc. not Employment in Interstate Commerce.
- Sec. 484. Employees Working in Machine and Repair Shops, Roundhouses and Other Like Buildings.
- Sec. 485. Earlier Decisions Overruled by Rulings of National Supreme Court Cited in Two Foregoing Paragraphs.
- Sec. 486. When Car and Engine Repairers are Employed in Interstate Commerce.
- Sec. 487. Employees Repairing Engines and Cars in Transit or Temporarily Delayed.
- Sec. 488. Statutes of Shopmen Repairing Empty Cars in Terminal Yards and Engines in Roundhouses.
- Sec. 489. Subsequent Cases Applying the Doctrine of the Winters Case to Car and Engine Repairers.



- Sec. 490. Differentiating Factors Between Rulings in Winters and Pedersen Cases.
- Sec. 491. Illustrative Cases in which Car and Engine Repairers were not Employed in Interstate Commerce.
- Sec. 492. Repairing Cars and Engines Used Exclusively in Interstate Commerce.
- Sec. 493. Interstate Status of Employes Painting Instrumentalities of Commerce Among the States.
- Sec. 494. Linemen Repairing Telegraph and Telephone Lines of Interstate Carriers.

## CHAPTER XXV.

## INTERSTATE STATUS OF TRAIN AND SWITCHING CREWS.

- Sec. 495. Train Men on Interstate Trains are Employed in Interstate Commerce.
- Sec. 496. When Trainmen are not Engaged in Interstate Commerce.
- Sec. 497. Employes Preparing Interstate Trains for Movement.
- Sec. 498. Beginning and Termination of Federal Control over Crews on Trains Carrying Interstate Commerce.
- Sec. 499. Interstate Employment of Train Crews on Return Trip not Shown by Proof that Train on Outgoing Trip Carried Interstate Freight.
- Sec. 500. Train and Switching Crews "Making Up" and "Breaking Up" Interstate Trains in Railroad Yards.
- Sec. 501. Switching Cars Containing Intrastate Shipments into or out of Interstate Trains—Early Conflicting Rulings.
- Sec. 502. Status of Such Employes Finally Held to be Under Federal Control.
- Sec. 503. Test in Determining when Switching Crews are Employed in Interstate Commerce.
- Sec. 504. Doctrine of Behrens Case as to Interstate Status of Switching Crews Reaffirmed and Applied.
- Sec. 505. Exceptions to Rule that Switching Crews Moving Intrastate Cars Exclusively are Governed by State Law.
- Sec. 506. Switching Movements of Empty Cars in Railroad Yards to be Loaded with Interstate Freight.
- Sec. 507. Weighing of Cars containing Interstate Freight after Unloading to Determine Weight of Contents.
- Sec. 508. Switching Movement of Cars After Termination of Interstate Journey or After Receipt by Consignee.
- Sec. 509. Switching Cars Loaded with Interstate Freight for Repairs.
- Sec. 510. Local Movement of Cars in Yard Between Completion of one Interstate Trip and Commencement of Another.
- Sec. 511. Exceptions to Rule that Delivery of Cars at Destination ends its Interstate Status.
- Sec. 512. Switching Movement of Car of Lumber to be Used in Repairing the Building Cars Used in Interstate Commerce.

- Sec. 513. Employees Making up Train of Another Company for an Interstate Run over the Latter's Track.
- Sec. 514. Illustrative Cases Showing Employment of Switching Crews in Interstate Commerce.

## CHAPTER XXVI.

## INTERSTATE STATUS OF MISCELLANEOUS EMPLOYEES.

- Sec. 515. Employees Procuring Supplies and Materials to be Used on Interstate Trains.
- Sec. 516. Supplying and Moving Coal for Use of Engines Pulling Interstate Trains.
- Sec. 517. Status of Employees Dumping Coal from Chutes into Tenders of Interstate Engines.
- Sec. 518. Loading and Unloading Freight from Interstate Trains Constitutes Work in Interstate Commerce.
- Sec. 519. Status of Watchmen, Detectives and other Employees doing Police Duties.
- Sec. 520. Yard Clerks Engaged in Interstate Commerce, When.
- Sec. 521. Servants of Railroad Companies Handling United States Mail in Connection with Interstate Trains.
- Sec. 522. Agents of Express Companies.
- Sec. 523. Interstate Status of Express Messengers Employed Jointly by Railroad and Express Companies.
- Sec. 524. Pullman Employees.
- Sec. 525. Miscellaneous Employees.

## CHAPTER XXVII.

## NEGLIGENCE UNDER FEDERAL ACT.

- Sec. 526. The Statutory Provision.
- Sec. 527. Two Branches of Negligence Under First Section.
- Sec. 528. Negligence Criterion of Liability of Carrier Under National Statute.
- Sec. 529. Negligence need not be Proven when Violation of Safety Appliance Act is Cause of Injury.
- Sec. 530. Negligence of Human Agencies Not Limited to Fellow Servants as Construed under Common Law.
- Sec. 531. Negligence of Common Carrier Need Not be Shown by Direct or Positive Proof.
- Sec. 532. Judicial Definition of Negligence.
- Sec. 533. Carrier not Required to Furnish Latest, Best and Safest Appliances for Interstate Employees.
- Sec. 534. Custom or Practice of Other Railroads not Conclusive in Determining Exercise of Ordinary Care.
- Sec. 535. Decisions of National Courts Control in Determining Negligence—Contrary Rulings.
- Sec. 536. Conflicting Rulings Finally Eliminated by Controlling Decisions of National Supreme Court.
- Sec. 537. Negligent Act Must have been Committed while Employee was Acting within Scope of Employment.

- Sec. 538. Negligence Must be Proximate Cause of Injury.
- Sec. 539. Meaning of the Phrase "In Whole or in Part."
- Sec. 540. State Statutes Creating Presumption of Negligence from Injury Inapplicable to Interstate Employees.
- Sec. 541. Mississippi "Prima Facie" Statute Held Applicable to Actions under Federal Act.
- Sec. 542. Sufficiency of Evidence of Negligence to Submit Cause to Jury not Governed by Decisions of State Courts.
- Sec. 543. Effect of State Law Prohibiting Employment of Minors in Determining Negligence.
- Sec. 544. Applicability of Rule of Res Ipsa Loquitur to Actions under Federal Act—Conflicting Rulings.
- Sec. 545. Recovery Cannot be Defeated When Defendant's Negligence is Part of Causation.
- Sec. 546. Casualties Due to Sole Negligence of Employee, no Recovery under Federal Act.
- Sec. 547. Foregoing Principle Further Illustrated and Applied.
- Sec. 548. Cases Under Federal Act in Which the Facts were Held to Show Actionable Negligence.
- Sec. 549. Cases Under Federal Act in Which the Facts were Held not to Show Actionable Negligence.
- Sec. 550. Statute Covers Acts of Intrastate Employees and Defects in Instrumentalities Used Solely in Intrastate Commerce.
- Sec. 551. Intrastate Employees Injured by Negligence of Interstate Employees or Instrumentalities of Interstate Commerce have no Remedy under Federal Act.
- Sec. 552. Willful Wrongs not Within Terms of Act.

## CHAPTER XXVIII.

## ASSUMPTION OF RISK UNDER LIABILITY ACT.

- Sec. 553. The Statutory Provision.
- Sec. 554. Assumption of Risk a Defense under the Federal Act.
- Sec. 555. Doctrine of Horton Case Reexamined and Reaffirmed by National Supreme Court.
- Sec. 556. Effect of State Constitutions and Statutes Abolishing or Modifying Assumption of Risk on Interstate Employees.
- Sec. 557. Decisions of Federal Courts Control in Determining When Employee Assumes Risk.
- Sec. 558. Ordinary Risks and Known or Obvious Extraordinary Risks Assumed by Interstate Employees.
- Sec. 559. Exception to Rule that Servant Assumes Obvious or Known Risk—Promises of Repair.
- Sec. 560. When Assumption of Risk is a Defense to Negligent Acts of Fellow Servants.
- Sec. 561. Analysis of Federal Decisions Applying Doctrine of Assumption of Risk to Interstate Employees of Railroads.
- Sec. 562. Distinction Between Assumption of Risk and Contributory Negligence.



- Sec. 563. When Assumption of Risk is not a Defense—Federal Safety Appliance Laws.
- Sec. 564. State Statutes for Safety of Employes not Included.
- Sec. 565. Assumption of Risk Eliminated in Actions for Violation of Hours of Service Act.
- Sec. 566. Confusing Assumption of Risk with Contributory Negligence in Jury Instructions under Federal Act.
- Sec. 567. When Assumption of Risk is no Defense When there is a Plurality of Causes.
- Sec. 568. Violations of Rules not Assumption of Risk.
- Sec. 569. Concrete Instruction must be Given, if Requested.
- Sec. 570. Failure to Instruct on Assumption of Risk not Error When Defendant has not been Prejudiced Thereby.
- Sec. 571. Burden of Proving Assumption of Risk upon Defendant.
- Sec. 572. Defense of Assumption of Risk Must be Pleaded to be Available.
- Sec. 573. Cases in Which Interstate Employes were Held to have Assumed the Risk.
- Sec. 574. Cases in Which Interstate Employes were Held not to have Assumed the Risk.

## CHAPTER XXIX.

## CONTRIBUTORY NEGLIGENCE UNDER LIABILITY ACT.

- Sec. 575. The Statutory Provision.
- Sec. 576. Contributory Negligence Defined.
- Sec. 577. Right of Recovery under Federal Act not Barred by Contributory Negligence.
- Sec. 578. Two Theories of Comparative Negligence Extant in United States.
- Sec. 579. Purpose of Congress in Modifying Common Law Rule of Contributory Negligence.
- Sec. 580. Apportionment of Damages under Federal Act Different from Georgia Statute.
- Sec. 581. Employe's Contributory Negligence to Reduce Damages must Proximately Contribute to Injury.
- Sec. 582. Gross Negligence of Plaintiff and Slight Negligence of Defendant Cannot Defeat Recovery.
- Sec. 583. When Defendant's Act is no Part of Causation, Plaintiff Cannot Recover.
- Sec. 584. How Damages Apportioned When Employe is Guilty of Contributory Negligence.
- Sec. 585. When Duty of Trial Court to Instruct on Contributory Negligence Arises under Federal Act.
- Sec. 586. Method of Instructing the Jury When there is Evidence of Contributory Negligence.
- Sec. 587. Instruction on Contributory Negligence in Language of Statute not Erroneous.
- Sec. 588. Erroneous Instructions on Contributory Negligence Under the Federal Act.

- Sec. 589. When Contributory Negligence of Employee Does not Diminish Damages—Federal Safety Appliance Laws.
- Sec. 590. Burden is Upon Defendant to Prove Contributory Negligence.
- Sec. 591. Whether Contributory Negligence Must be Pleaded, Determined by State Law.
- Sec. 592. Evidence of Contributory Negligence Admissible Under General Denial, When.

## CHAPTER XXX.

## BENEFICIARIES UNDER LIABILITY ACT.

- Sec. 593. Beneficiaries under the Federal Statute.
- Sec. 594. Parents not Entitled to Damages when there is a Widow or Children.
- Sec. 595. Alien Dependents Residing Abroad may Recover under Federal Act.
- Sec. 596. Existence of Beneficiaries Named in Statute Jurisdictional.
- Sec. 597. Who are "Next of Kin" under Federal Act must be Determined by State Law.
- Sec. 598. Illegitimate Children may be Next of Kin within Meaning of Federal Statute.

## VOLUME II.

## PART THREE—CONTINUED.

## CHAPTER XXXI.

## DAMAGES IN DEATH CASES UNDER LIABILITY ACT.

- Sec. 599. The Statute.
- Sec. 600. No recovery under Federal Act unless Relatives Named in Statute Suffer Pecuniary Loss.
- Sec. 601. If Injured Employee Lives an Appreciable Length of Time, Beneficiaries May Also Recover Under 1910 Amendment.
- Sec. 602. Damages Under Section 9 Limited to Loss and Suffering While Deceased Employee Lived.
- Sec. 603. Loss of Future Earnings of Decedent not Included in Damages Due Beneficiaries Under Section 9.
- Sec. 604. No Recovery for Pain and Suffering of Deceased by Beneficiaries Prior to 1910 Amendment.
- Sec. 605. No Recovery of Damages under Section 9 when Death of Employee is Instantaneous.
- Sec. 606. Death Must be Result of Negligence before Beneficiaries can Recover under Section 1, but not under Section 9.
- Sec. 607. Decisions of National Courts on Measure of Damages Control.
- Sec. 608. Measure of Damages in Cases of Death under Section One of the Federal Act.

- Sec. 609. Damages Due Beneficiaries for Loss of Future Benefits Limited to Present Cash Value.
- Sec. 610. Subsequent Application of Doctrine of Kelly Case in State Courts.
- Sec. 611. Statutory Action is not for the Equal Benefit of each of the Surviving Beneficiaries.
- Sec. 612. Pecuniary Loss not Dependent upon any Legal Liability of the Employee to the Beneficiaries.
- Sec. 613. Distribution of Amount Recovered Controlled by Federal Statute and not State Laws.
- Sec. 614. Method of Apportioning Fund Among Beneficiaries upon a Lump Sum Settlement.
- Sec. 615. No Presumption of Damage to Widow and Child.
- Sec. 616. Effect of Abandonment by Husband on Right of Widow and Child to Recover.
- Sec. 617. Loss of Society, Companionship and Wounded Affections not Elements of Damages.
- Sec. 618. Loss of Care, Counsel, Training and Education of Minors Proper Elements of Damages.
- Sec. 619. Damages for the Estate of Decedent not Recoverable.
- Sec. 620. Necessity of Evidence Showing Earnings Beneficiaries have been Deprived of.
- Sec. 621. Award of Exemplary Damages not Permissible as to Interstate Employees.
- Sec. 622. Funeral Expenses not Recoverable in Actions under the Federal Act.
- Sec. 623. Necessity of Showing Contributions during Lifetime of Deceased to Beneficiaries of First and Second Classes.
- Sec. 624. Illustrative Cases Involving Sufficiency of Proof to Establish Dependency.
- Sec. 625. Actual Dependency Either Total or Partial must be shown by Beneficiaries of Third Class.
- Sec. 626. What Constitutes Dependency as to Third Class Beneficiaries.
- Sec. 627. Proof of Occasional Gifts does not Create Dependency as to Beneficiaries of Third Class.
- Sec. 628. Cases Declaring the True Measure of Damages and Approved by the United States Supreme Court.
- Sec. 629. Erroneous Instructions on Measure of Damages under Federal Act.
- Sec. 630. Errorless Instructions on Measure of Damages under Federal Act.
- Sec. 631. Reference in Instructions on Measure of Damages to Sum Sued for, not Erroneous.
- Sec. 632. State Statutes Limiting Amounts Recoverable in Death Cases Inapplicable to Interstate Employees.
- Sec. 633. State Law Giving Earnings of Minor Son to Father Applicable in Determining Pecuniary Loss.
- Sec. 634. Effect of Excessive Apportionment to one Beneficiary.

- Sec. 635. Remittitur may Cure Error of Failure to Reduce Damages on Account of Contributory Negligence.
- Sec. 636. Propriety of Special Verdicts When Actions Involve Reduction of Damages Due to Contributory Negligence.
- Sec. 637. Settlement with One Beneficiary does not Defeat Action by a Personal Representative.
- Sec. 638. Damages Due Each Beneficiary May be Apportioned in the Verdict.

#### CHAPTER XXXII.

##### CONTRACTS FORBIDDEN BY LIABILITY ACT.

- Sec. 639. The Statutory Provision.
- Sec. 640. Statute Prohibiting Carriers from Evading Liability by Contracts or Regulations, Valid.
- Sec. 641. Statute Applies to Existing as Well as Future Contracts.
- Sec. 642. Acceptance of Benefits from Employer no Bar to Suit Against Joint Tort-Ffeasor.
- Sec. 643. Inhibition of Section 5 Limited to Employes of the Carrier.
- Ses. 644. Release of Cause of Action for Injury not a Contract Within Section 6.

#### CHAPTER XXXIII.

##### STATUTE OF LIMITATION.

- Sec. 645. Statutory Provision.
- Sec. 646. Institution of Suit Within Specified Time a Condition Precedent to Recovery.
- Sec. 647. Plea of Limitation not Required When Record Shows Filing of Suit after Lapse of Two Years.
- Sec. 648. Limitation Period may not be Avoided by Estoppel or Fraudulent Representations.
- Sec. 649. Insanity of Injured Employee Cannot Operate to Extend Time for Filing Suit.
- Sec. 650. When Cause of Action under Federal Act Accrues in Death Cases.
- Sec. 651. Time of Commencement of Action a Question of Procedure.
- Sec. 652. Error to Submit Question of Limitation to Jury When Facts Appear Without Dispute.

#### CHAPTER XXXIV.

##### JURISDICTION OF STATE AND FEDERAL COURTS.

- Sec. 653. Actions may be Brought in Federal Courts.
- Sec. 654. Suits under Federal Act may Also be Prosecuted in State Courts.
- Sec. 655. Causes Instituted in State Courts not Removable to Federal Courts.
- Sec. 656. Removability when Petition States Cause of Action under both State Law and Federal Act in Separate Courts.



- Sec. 657. Contrary Decisions by Other Federal Courts.
- Sec. 658. When Petition Does not State Cause of Action Under Federal Act Although so Intended.
- Sec. 659. Judgment of Highest State Court in Action under Federal Act may be Reviewed by United States Supreme Court, When.
- Sec. 660. Remedy by Writ of Error Excluded in Certain Cases by Amendatory Act of 1916.
- Sec. 661. Record must Show Right under Federal Laws was Specially Set up and Denied by State Court.
- Sec. 662. Contention that there is or is not Sufficient Evidence to Show Liability, Will Support Writ of Error.
- Sec. 663. Power to Review does not Extend to Questions Merely Incidental and Non-Federal in Character.
- Sec. 664. Ruling of State Court that Federal Question was Sufficiently Raised Binding upon United States Supreme Court.
- Sec. 665. Federal Questions to Support Writ of Error to United States Supreme Court, need not be Raised by the Pleadings.
- Sec. 666. Foregoing Rule Subsequently Qualified, Limited and Explained.
- Sec. 667. Pleading Federal Act and Submitting Case to Jury Under State Law, no Denial of Federal Right.
- Sec. 668. When Petition not Stating a Good Cause of Action under Federal Act Raises a Federal Question.
- Sec. 669. Claim that Verdict is Excessive not Reviewable by Writ of Error.
- Sec. 670. Pleading and Practice in State Courts Under Employers' Liability Statute not Federal Questions.
- Sec. 671. State Law Requiring Facts Showing Applicability of Federal Act to be Pleaded no Denial of Federal Right.
- Sec. 672. Refusal of Trial Court to Take Case from Jury Will not be Disturbed by National Supreme Court Unless Palpably Erroneous.

## CHAPTER XXXV.

## PARTIES, PLAINTIFFS AND DEFENDANTS, IN ACTIONS UNDER LIABILITY ACT.

- Sec. 673. Personal Representative Only can Bring Suit in Case of Death.
- Sec. 674. Widow Cannot Maintain Suit in Individual Capacity Although she May be Sole Beneficiary.
- Sec. 675. Want of Legal Capacity in Widow to Sue Cannot be Waived.
- Sec. 676. Ancillary Administrator may Sue Under the Federal Act.
- Sec. 677. Personal Representative Alone may Revive Suit Commenced by Employee in his Lifetime.
- Sec. 678. Existence of Other Property Not Necessary to Secure Appointment of Personal Representative.

- Sec. 679. Agents and Servants Whose Negligence Caused Injury, not Liable under the Federal Act.
- Sec. 680. Lessor of a Railroad may be Made Party Defendant.
- Sec. 681. Personal Representative Appointed in One State Cannot Sue in Another State Without Consent.

## CHAPTER XXXVI.

## PLEADINGS UNDER LIABILITY ACT.

- Sec. 682. Plaintiff's Petition Must Plead Facts Showing That Injury or Death Occurred under Conditions Described in Federal Act.
- Sec. 683. If Petition States Cause of Action Solely under Federal Law, There can be no Recovery under State Law—Contrary Rulings.
- Sec. 684. Petition Stating a Cause of Action Under State Law, Recovery Permitted under Federal Act When Omitted Allegations are Supplied by the Answer.
- Sec. 685. Recovery under Petition Stating Cause of Action under State Law Though Evidence Shows a Case under Federal Act, Harmless Error on Appeal, When.
- Sec. 686. Pleading Cause of Action under State Law in One Count and under Federal Act in Another Count, Allowed.
- Sec. 687. Petition Need not Specifically Refer to the Act if Facts Showing Liability Thereunder are Pleaded.
- Sec. 688. State Law as to Sufficiency of Pleading Governs.
- Sec. 689. Allegations as to Engagement in Interstate Commerce Held Sufficient.
- Sec. 690. Allegation to Show Cause of Action under the Federal Act Held not Sufficient.
- Sec. 691. In cases of Death Petition Must Allege Survival of Beneficiaries Named in Statute.
- Sec. 692. Petition Must Allege Pecuniary Loss to Beneficiaries.
- Sec. 693. In Suits under State or Common Law, Applicability of Federal Act may be Raised by Answer.
- Sec. 694. Where Petition is Under State Law and Evidence Shows Case under Federal Statute, Plaintiff Cannot Recover.
- Sec. 695. Defendant in Suit under State Law Must Specifically Plead Facts under Federal Act to Defeat Recovery.
- Sec. 696. Amendment Setting up New Cause of Action after Two-Year Period of Limitation not Allowed.
- Sec. 697. Amendments Permissible after Two-Year Period of Limitation.

## CHAPTER XXXVII.

## EVIDENCE UNDER LIABILITY ACT.

- Sec. 698. Rules of Evidence Governed by State Law.
- Sec. 699. Law of Forum Determines Whether Widow or Other Beneficiaries may Testify.

- Sec. 700. State Law not Applicable in Passing on Demurrer to the Evidence.
- Sec. 701. Record Evidence of Interstate Shipments—Statutory Provision and Order of Interstate Commerce Commission.
- Sec. 702. Method of Proving When Train and Switching Crews are Engaged in Interstate Commerce.
- Sec. 703. Method of Proving When Other Railroad Employes are Engaged in Interstate Commerce.
- Sec. 704. Evidence Held Sufficient to Show that Train was Carrying Interstate Commerce.
- Sec. 705. Evidence Held not Sufficient to Show that Train was Carrying Interstate Commerce.

## CHAPTER XXXVIII.

## MATTERS OF PRACTICE UNDER LIABILITY ACT.

- Sec. 706. At What Stage of Proceedings, Motion to Elect Should be Sustained—Practical Considerations.
- Sec. 707. Motions to Elect under Iowa Statute in Actions under Federal Act.
- Sec. 708. Instances Where Motion to Elect Should have been Sustained before Trial.
- Sec. 709. Widow Suing in her Own Name in One Suit and as Administratrix in Another, Cannot be Compelled to Elect.
- Sec. 710. Verdicts by Less Than Twelve Jurors, When Permissible under State Law, Valid in Actions under Federal Statute.
- Sec. 711. Commencement of Action under State Law no Bar to Subsequent Suit under Federal Act.
- Sec. 712. When Suit under State Law is Res Adjudicata.
- Sec. 713. Errors in Actions under Federal Act Held Harmless on Appeal.
- Sec. 714. Practice of Granting Partial new Trials in Actions under Federal Act, Proper, When.
- Sec. 715. Power of State Courts under Federal Act to Direct Entry of Judgment Notwithstanding Verdict.
- Sec. 716. Power of Administrator to Settle Claims under Federal Act Without Consent of Court.
- Sec. 717. State Laws Adding Penalties to Judgment when Affirmed on Appeal Applicable under Federal Act.
- Sec. 718. Plaintiff in Action under Federal Act may Sue as a Poor Person in United States Courts, When.

## PART FOUR

## FEDERAL SAFETY APPLIANCE ACT.

## CHAPTER XXXIX.

HISTORICAL REVIEW OF ORIGINAL ACT AND AMENDMENTS  
AND ORDERS THEREUNDER.

- Sec. 719. Futile Legislation of the States Requiring the Use of Automatic Couplers.
- Sec. 720. Liability of Carriers under the Common Law as to Couplers and Brakes.
- Sec. 721. Causes Including the Enactment of the Original Federal Safety Appliance Act.
- Sec. 722. Summary of the Provisions of the Original Act of 1893.
- Sec. 723. Original Order of Commission Prescribing Standard Height of Drawbars on Freight Cars.
- Sec. 724. Inadequacies and Defects of Statute and Difficulties in its Enforcement.
- Sec. 725. Summary of the Amendments of 1903.
- Sec. 726. Order of Commission Increasing Minimum Percentage of Cars in Trains to be Equipped with Air Brakes.
- Sec. 727. Agitation for Standard Safety Appliances on all Cars used by Railroads Engaged in Interstate Commerce.
- Sec. 728. Interstate Commerce Commission Authorized to Standardize Appliances by Amendment of 1910.
- Sec. 729. New Order Concerning Height of Drawbars on Freight Cars.
- Sec. 730. Standardization Order of the Interstate Commerce Commission.

## CHAPTER XL.

PURPOSE, GENERAL SCOPE, VALIDITY, INTERPRETATION AND  
EFFECT OF STATUTE.

- Sec. 731. Validity of the Original Safety Appliance Act of 1903.
- Sec. 732. Purpose and Object of Congress in Enacting the Safety Appliance Act.
- Sec. 733. Construction of Statute.
- Sec. 734. Rules Governing Construction of Criminal Statute not Applicable.
- Sec. 735. Federal Decisions Control in Construing Safety Appliance Act.
- Sec. 736. Custom of Railroads with Acquiescence of Commission Persuasive in Determining Meaning of Statute.
- Sec. 737. Distinction Between This Statute and Employers' Liability Act as to Intrastate Commerce.
- Sec. 738. Remedial Provisions of Safety Appliance Act not Limited to Employes.



- Sec. 739. Statute Applies to All the Territories of the United States and the District of Columbia.
- Sec. 740. Safety Appliance Act as Amended Includes Cars Used in Intrastate as Well as in Interstate Commerce.
- Sec. 741. Constitutionality of Amendment Including Cars Used Exclusively in Intrastate Commerce.
- Sec. 742. Relationship of Intrastate Cars to Interstate Commerce.
- Sec. 743. Meaning of the Term "Used" on Interstate Highways.
- Sec. 744. Applicability of Statute to Intrastate Cars on Tracks Other Than Main Lines.
- Sec. 745. No Distinction Between Passenger and Freight Cars.
- Sec. 746. State Laws as to Safety Appliances on all Cars of Interstate Railroads Invalid.
- Sec. 747. Punishment of Crime Against Two Sovereignties Not Applicable in Such Cases.
- Sec. 748. Delegation to American Railway Association and Commission of Authority to Designate Height of Drawbars Valid.
- Sec. 749. Cars and Vehicles Subject to the Statute.
- Sec. 750. Statute Applies to Island of Porto Rico.
- Ses. 751. Carriers Hauling Car with Defective Appliances over Track of Another Railroad Subject to Penalty.

## CHAPTER XLI.

## WHEN CARRIERS ARE ENGAGED AND CARS ARE USED IN INTERSTATE COMMERCE UNDER SAFETY APPLIANCE ACT.

- Sec. 752. Scope of Chapter.
- Sec. 753. What Constitutes Interstate Commerce within Purview of Safety Appliance Act.
- Sec. 754. Railroad Must be a Common Carrier.
- Sec. 755. Two Requirements as to Interstate Character of Carriers and Cars Prior to 1903 Amendment.
- Sec. 756. Proof of Use of Car in Moving Interstate Traffic not Essential Since the 1903 Amendment.
- Sec. 757. But Use of Car in Moving Interstate Traffic Still Material in Determining Application of Employers' Liability Act.
- Sec. 758. Interstate Status of Belt Lines, Terminal Railroads and Stock Yard Companies.
- Sec. 759. Railroad Wholly Within State Transporting Freight in Continuous Shipment Without Traffic Agreement with Other Carriers.
- Sec. 760. Foregoing Principle Illustrated and Applied in Adjudicated Cases.
- Sec. 761. Interurban Electric Railroads Participating in Movement of Interstate Traffic.
- Sec. 762. Industrial Railroads Forming Connecting Link for Interstate Transportation.
- Sec. 763. Transportation from One Point to Another in Same State Passing in Transit Through Another State.

- Sec. 764. All Cars Hauled in Interstate Trains Impressed with Interstate Character.
- Sec. 765. Switching of Car From One Yard to Another Preparatory for Interstate Trip.
- Sec. 766. Re-billing Does not Control in Determining Whether a Shipment is Interstate or Intrastate.
- Sec. 767. Hauling Empty Car Over the State Line Constitutes Interstate Commerce.
- Sec. 768. Car Containing Interstate Traffic Placed on Switching Track for Repairs.
- Sec. 769. Dining Car on Siding Regularly Hauled in Interstate Trains.
- Sec. 770. Transportation of Interstate Traffic for Express Companies.
- Sec. 771. Transportation of Company Property Over State Line is Interstate Commerce.
- Sec. 772. Distinctions between "Haul" and "Use" of Cars Eliminated by 1903 Amendment.
- Sec. 773. Movement of Cars From Transfer Tracks to Industrial Track.

## CHAPTER XLII.

## BASIS, NATURE AND EXTENT OF LIABILITY UNDER STATUTE.

- Sec. 774. Disregard of Requirements of Statute Negligence Per Se.
- Sec. 775. Statute Imposes Absolute and Unqualified Duty to Maintain Appliances in Secure Condition.
- Sec. 776. Substitutes for Appliances Required by Safety Appliance Act not Lawful.
- Sec. 777. Duty of Carrier in Personal Injury Suits as Broad as in Actions for Penalties.
- Sec. 778. Remedial Features of the Statute Apply to Movements of Cars Solely for Repairs.
- Sec. 779. Doctrine of *Seigel v. New York, C. & H. R. R. Co.*, and Like Cases, Overruled.
- Sec. 780. Duties Imposed by Statute in One Relation not Actionable in Another.
- Sec. 781. Proof of Knowledge of Defect Not an Element of Violation of Statute.
- Sec. 782. Use of Care and Diligence in Discovering and Repairing Defects, No Defense.
- Sec. 783. Proof of Negligence Under Liability Act not Required if Injury was Due to Violation of Safety Appliance Act.
- Sec. 784. Same Subject—*Taylor v. St. Louis, I. M. & S. Ry. Co.*
- Sec. 785. When Employe's Negligence is Sole Cause of Injury, No Recovery Permitted.
- Sec. 786. Duties Imposed by Statute Cannot be Evaded by Contract.
- Sec. 787. Inconvenience and Impracticability of Statutory Requirements Will not Excuse Violation.
- Sec. 788. Appliances Required by Statute must be Operative.

- Sec. 789. Failure of Employee to Operate Appliance Capable of Being Operated, no Offense.
- Sec. 790. Deliberate Act of Employee in Causing Appliance to become Defective, no Defense.
- Sec. 791. Duties Placed upon Carrier by Statute Cannot be Evaded by Assignment.
- Sec. 792. Railroad Liable for Condition of Foreign Cars.
- Sec. 793. Carriers may Refuse Defective Cars from Connecting Lines.
- Sec. 794. Defective Equipment Must be Proximate Cause of Injury.
- Sec. 795. Question of Proximate Cause Ordinarily for the Jury.

## CHAPTER XLIII.

## STATUTORY REQUIREMENTS AS TO AIR BRAKES.

- Sec. 796. Former and Present Requirements as to Power or Air Brakes on Trains.
- Sec. 797. Air Brake Provision not Applicable to Switching Movements.
- Sec. 798. What Constitutes a "Train" Under Air Brake Provision.
- Sec. 799. Inter-yard Movements as Distinguished from Intra-yard Movements Within Air Brake Provision—Transfer Trains.
- Sec. 800. Air Brakes Required on Interurban Electric Trains and Motors.
- Sec. 801. Injuries in Collisions Due to Failure of Train Brakes to Work.
- Sec. 802. Use of Hand Brakes in Train Movements Prohibited and Operation of Air Brakes Mandatory.
- Sec. 803. Absolute Duty to Maintain Appliances in Repair Applies to Air Brakes.

## CHAPTER XLIV.

## STATUTORY REQUIREMENTS AS TO AUTOMATIC COUPLERS.

- Sec. 804. The Statutory Provision.
- Sec. 805. Object of Congress in Requiring Automatic Couplers on Railroad Cars.
- Sec. 806. Illustrative Cases Showing Defective Couplers in Violation of Statute.
- Sec. 807. Failure of Coupler to Work Under all Circumstances Constitutes Violation of Statute.
- Sec. 808. Employees Entitled to Protection of Statute Requiring Automatic Couplers.
- Sec. 809. Trainmen on Top of Cars and not Actually Engaged in Coupling Them.
- Sec. 810. When Violation of Automatic Coupler Provision is not Actionable as to Employees Injured on Duty.
- Sec. 811. Employees Entering Between Cars for Other Purposes Than Coupling or Uncoupling.
- Sec. 812. Effect of Equipping Cars with Automatic Couplers of Different Patterns.

- Sec. 813. Coupler Provision Applies to all Cars on Interstate Highways by Rail.
- Sec. 814. Automatic Couplers Required in Switching Operations as well as in Line Movements.
- Sec. 815. Statute Applies to Coupling as Well as to Uncoupling.
- Sec. 816. Coupling of Air and Steam Hose Between Cars no Part of Coupling Operation.
- Sec. 817. Operative Couplers Required at Both Ends of Cars.
- Sec. 818. Exception to the Foregoing—Conflicting Rulings.
- Sec. 819. Automatic Couplers not Required on Singly Operated Self-Propelled Trolley Cars.
- Sec. 820. Preparation of Car for Coupling, Part of Act Regulated by Statute.
- Sec. 821. That Coupling Could Have Been Automatically Effected by Using Lever on Other Side, no Defense.
- Sec. 822. Automatic Couplers not Required between Engine and Tender.
- Sec. 823. Actual Use of Coupler not Necessary to Constitute Offense.
- Sec. 824. Failure of Pin Lifter to Open Knuckles.
- Sec. 825. Illustrative Cases in which Violations of Coupler Provision Held to be Proximate Cause of Injuries.
- Sec. 826. Forms of Instructions for Violation of Coupler Provision in Personal Injury Cases.
- Sec. 827. Model Couplers May be Exhibited to the Jury.

#### CHAPTER XLV.

##### DUTIES OF CARRIERS AS TO GRAB IRONS, SILL STEPS, RUNNING BOARDS AND HAND BRAKES.

- Sec. 828. Requirement of Original Act Limited to Handholds for Coupling and Uncoupling Purposes Only.
- Sec. 829. Grab Iron Provision Enlarged by Amendment of 1903 to Include Intrastate Cars.
- Sec. 830. Sill Steps, Hand Brakes, Ladders, Running Boards and Certain Grab Irons.
- Sec. 831. Employees Using Grab Irons for Other Purposes Than Coupling Cars, Within Protection of Statute.
- Sec. 832. No Distinction between Foreign and Domestic Cars.
- Sec. 833. Substitutes Affording Equal Security with Grab Iron or Handhold Unlawful.
- Sec. 834. Duty to Furnish Sill Steps, Running Boards, Hand Brakes and Handholds Absolute and Mandatory.
- Sec. 835. Duties of Carriers Include Maintenance as well as Equipment of Cars with Statutory Appliances.
- Sec. 836. Patton v. Illinois C. R. Co. and Like Cases Overruled.
- Sec. 837. Extent of the Requirements of Section 2 of the 1910 Amendment.



- Sec. 838. Illustrative Violation of Failure to Maintain Secure Running Board.
- Sec. 739. Erroneous Views as to Non-Applicability of Hand Brake Provision to Switching Operations.
- Sec. 840. Requirements of Section 2 of 1910 Amendment not Affected by Order of Interstate Commerce Commission under Section 3.
- Sec. 841. Purpose of Congress in Empowering Commission to Prescribe Standardized Equipments on all Cars.

## CHAPTER XLVI.

## STATUTORY REQUIREMENTS AS TO DRAWBARS.

- Sec. 842. Standard Height of Drawbar Required After December 31, 1910.
- Sec. 843. Distinction Between New and Old Orders as to Height of Drawbars.
- Sec. 844. Ruling in St. Louis, I. M. & S. Ry. Co. v. Taylor, Modified by New Order.
- Sec. 845. Instruction Erroneous Under Both Old and New Orders.
- Sec. 846. Instructions Erroneous Under Old Order but Correct Under the New Order.
- Sec. 847. Drawbar Provision Applicable to Engines as well as Cars.
- Sec. 848. Duty as to Height of Drawbars Cannot be Delegated or Evaded by Casting it Upon Others.

## CHAPTER XLVII.

## CARS AND MOVEMENTS EXCEPTED FROM REQUIREMENTS OF STATUTE.

- Sec. 849. The Statutory Provision.
- Sec. 850. "Necessary Movement" for Repairs Defined.
- Sec. 851. When Duty Arises to Repair Cars at Point of Discovery.
- Sec. 852. All Movements of Cars from Repair Points Prohibited.
- Sec. 853. Illustrative Movements in Violation of 1910 Proviso.
- Sec. 854. Burden upon Carrier to Bring Itself Within Proviso of Act of 1910.
- Sec. 855. Defective Cars may be Hauled to Repair Points in Revenue Trains or with Other Cars Commercially Used.
- Sec. 856. Exceptions to the Safety Appliance Act must be Strictly Construed.
- Sec. 857. Exempted Movements for Repair do not Affect Liability for Personal Injuries.
- Sec. 858. Cars on Interurban Railroads Moving Partly Over Street Railroad Tracks Not Exempted.
- Sec. 859. May Haul Defective Cars Containing Livestock or Perishable Freight with Chains.
- Sec. 860. Necessity of Movement for Repairs Generally a Question for the Jury.

- Sec. 861. Law as to Movement of Defective Cars Prior to 1910 Amendment.
- Sec. 862. Cars Exempted from Requirements of Act on Interstate Highways not Subject to State Laws.

## CHAPTER XLVIII.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE  
UNDER SAFETY APPLIANCE ACT.

- Sec. 863. Assumption of Risk no Defense to Injury Due to Violation of Safety Appliance Act.
- Sec. 864. Employee's Knowledge of Defect no Bar to a Suit.
- Sec. 865. Assumption of Risk When Two Distinct Acts of Negligence are Submitted.
- Sec. 866. Distinction between Assumption of Risk and Contributory Negligence.
- Sec. 867. Contributory Negligence a Defense Prior to Enactment of Employers' Liability Act.
- Sec. 868. Contributory Negligence no Defense When Injured Employee is Engaged in Interstate Commerce.
- Sec. 869. Contributory Negligence a Defense When Employee is Engaged in Intrastate Commerce.
- Sec. 870. State Statutes Abolishing Defense of Contributory Negligence Applicable under Safety Appliance Act, When.
- Sec. 871. Effect of Rule Forbidding Employees from Going Between Cars While in Motion.
- Sec. 872. Contributory Negligence a Defense to Failure to Have Air Brakes on Logging Trains on Interstate Railroads.
- Sec. 873. Contributory Negligence as a Matter of Law in Choosing Dangerous Way to Uncouple Cars with Safe Method Available.
- Sec. 874. Errorless Instructions on Contributory Negligence in Such Cases.
- Sec. 875. When Contributory Negligence is a Question for the Jury.
- Sec. 876. Illustrative Cases in which Employees Going Between Cars were Not Guilty of Contributory Negligence as a Matter of Law.

## CHAPTER XLIX.

JURISDICTION OF COURTS AND MATTERS OF PLEADING AND  
PRACTICE IN PERSONAL INJURY CASES.

- Sec. 877. Rights under Statute for Personal Injuries May be Enforced in State Courts.
- Sec. 878. Procedure Controlled by State Rules.
- Sec. 879. Petition in Personal Injury Cases Need Specifically Refer to Statute.
- Sec. 880. Plaintiff Not Required to Negative Provisos.

- Sec. 881. Allegation as to Use of Car in Moving Intrastate Traffic.
- Sec. 882. Submitting Case under Safety Appliance Act Without Allegation of Interstate Employment not Error, When.
- Sec. 883. Judicial Notice of Orders of Commission under Safety Appliance Act.
- Sec. 884. Federal Statute of Limitation Controls When Employee is Engaged in Interstate Commerce.
- Sec. 885. State Statute of Limitation Controls in Absence of Interstate Employment.
- Sec. 886. Effect of Amendment Stating a New Cause of Action After Statute has Run.

#### CHAPTER L.

##### ACTIONS FOR PENALTIES.

- Sec. 887. In Prosecutions for Penalty, Carrier Liable as to Each Car Hauled in Violation of Statute.
- Sec. 888. Appropriate Remedy for Recovery of Statutory Penalty.
- Sec. 889. Proceedings for Penalties Not Criminal Actions.
- Sec. 890. Burden and Quantum of Proof in Actions for Penalties.
- Sec. 891. Preponderance of the Evidence Defined.

#### PART FIVE

##### MISCELLANEOUS FEDERAL LAWS REGULATING CARRIERS.

- Hours of Service Act.
- 28-Hour Live Stock Law.
- Boiler Inspection Act.
- Ash Pan Act.
- Accident Reports Act.
- Adamson Law.

#### CHAPTER LI.

##### FEDERAL HOURS OF SERVICE ACT.

###### A. PURPOSE, SCOPE, VALIDITY AND INTERPRETATION OF ACT.

- Sec. 892. State and Federal Control over Hours of Labor of Employees of Interstate Carriers.
- Sec. 893. Carriers and Employees Subject to the Hours of Service Act.
- Sec. 894. Constitutionality of the Hours of Service Act Affirmed.
- Sec. 895. Statute not Void for Uncertainty.
- Sec. 896. Classification of Operators in Section 2 of Statute does not Render Statute Invalid.
- Sec. 897. Power of Commission to Require Monthly Reports by Carriers Showing Violations of Statute.
- Sec. 898. Purpose of Congress in the Enactment of the Hours of Service Act.

- Sec. 899. The Statute, being Remedial, should be Liberally Construed.
- Sec. 900. Term "Railroad" as Used in the Act Defined.
- Sec. 901. Penalties for Violation of Statute—Procedure and Duty of Interstate Commerce Commission.
- Sec. 902. Separate Penalty Incurred for each Employe Kept on Duty Beyond Statutory Period Though Due to Same Cause.
- Sec. 903. Statute may not be Evaded by Requiring Service of Another Kind after Statutory Period.

B. LIMITATIONS UPON HOURS OF SERVICE.

- Sec. 904. Limitation upon the Hours of Service of Employes Engaged in or Connected with Movement of Trains.
- Sec. 905. When an Employe is "on Duty."
- Sec. 906. Effect of Brief Periods Off Duty in Breaking Continuity of Service.
- Sec. 907. Release from Duty for Definite Period of Two Consecutive Hours.
- Sec. 908. Duty to Substitute Relief Crews at Intermediate Terminals to Prevent Excessive Hours.
- Sec. 909. Fireman Engaged in Watching an Engine on Duty Within Meaning of Statute.
- Sec. 910. Limitation upon the Hours of Service of Employes Handling Orders Affecting Train Movements.
- Sec. 911. Applicability of Operators' Proviso to Tower Men and Switch Tenders in Railroad Yards—Conflicting Rulings.
- Sec. 912. Hours of Service in Telegraph Offices Operated During Day and Part of Night.
- Sec. 913. Separate Periods of Service for Operators not Exceeding Total of Nine Hours in Twenty-four Hours, not Unlawful.
- Sec. 914. Two Telegraph Offices in One City Constitute One "Place" Within Statute, When.

C. STATUTORY EXCEPTIONS AND EXCUSES.

- Sec. 915. When Provisions of Statute Limiting Hours of Service are not Applicable.
- Sec. 916. Terms "Casualty," "Unavoidable Accident" and "Act of God" as Used in Section 3 Defined.
- Sec. 917. High Degree of Diligence Required to Bring Carrier Within Statutory Exceptions.
- Sec. 918. Derailments and Collisions of Trains Constitute "Casualties" within Meaning of Exemption Clause.
- Sec. 919. Ordinary Delays Incident to Train Operation not Valid Excuses.
- Sec. 920. What Constitutes an Emergency Within Operators' Proviso of Section 2.
- Sec. 921. Insubordination of Employe may Constitute "Emergency" Within Section 2.
- Sec. 922. Burden of Proving Excessive Service to be Within Statutory Exception is Upon Carrier.



## CHAPTER LII.

## FEDERAL 28-HOUR LIVE STOCK LAW.

- Sec. 923. Duties of Interstate Common Carriers in Transporting Live Stock.
- Sec. 924. Time Consumed in Loading and Unloading Live Stock Must not be Considered—Exception as to Sheep.
- Sec. 925. Time may be Extended upon Written Request of Owner.
- Sec. 926. When Carriers are Excused from Complying with Statute.
- Sec. 927. Animals Unloaded Pursuant to Statute may be Fed at Expense of Owner.
- Sec. 928. Penalty for Non-Compliance with 28-Hour Live Stock Law.
- Sec. 929. Statute not Applicable when Animals are Properly Cared For.
- Sec. 930. Penalties may be Recovered by Civil Actions.

## CHAPTER LIII.

## FEDERAL BOILER INSPECTION ACT.

- Sec. 931. Railroads and Employes Subject to Boiler Inspection Act.
- Sec. 932. Duties and Obligations of Carriers Under Boiler Inspection Act.
- Sec. 933. President Authorized to Appoint Chief Inspectors of Locomotive Boilers.
- Sec. 934. Fifty Boiler Inspection Districts Created with One Inspector for Each.
- Sec. 935. Duties of District Inspectors in the Enforcement of Statute and Rules Thereunder.
- Sec. 936. Carrier May Appeal from Decision of Inspector as to Condition of Locomotive.
- Sec. 937. Rules and Regulations for Inspection of Locomotive Boilers Required to be Adopted and Enforced.
- Sec. 938. Nature of Duty Created by Boiler Inspection Act.
- Sec. 939. Reports of Accidents Affecting Locomotive Boilers, to be Filed by Carriers, When.
- Sec. 940. Commission May Publish Reports of Investigation of Accidents.
- Sec. 941. Reports of Investigations not to be Used in Damage Suits.
- Sec. 942. Penalties for Violation of Statute.
- Sec. 943. Terms "Railroad" and "Employes" Within Statute Defined.
- Sec. 944. Sworn Reports of Inspection by Carriers must be Filed.
- Sec. 945. Chief Inspector Required to Make Annual Report to Interstate Commerce Commission.
- Sec. 946. Amendment of 1915 to Boiler Inspection Act Extending Statute to all Parts of Locomotives.
- Sec. 947. State Laws Requiring Headlights Superseded by Amendment of 1915.

## CHAPTER LIV.

## FEDERAL ASH PAN ACT.

- Sec. 948. Federal Ash Pan Act.
- Sec. 949. Penalties for Violation of the Act.
- Sec. 950. Duties of Interstate Commerce Commission.
- Sec. 951. Receivers are Common Carriers within the Act.
- Sec. 952. Statute not Applicable to Electric Locomotives.

## CHAPTER LV.

## FEDERAL ACCIDENT REPORTS ACT.

- Sec. 953. Duties of Common Carriers under Federal Accident Reports Act.
- Sec. 954. Terms "Interstate Commerce" and "Foreign Commerce" Within Statute Defined.
- Sec. 955. Penalty for Failure to Make Such Reports Within Thirty Days After End of Each Month.
- Sec. 956. Interstate Commerce Commission Authorized to Investigate all Collisions, Derailments, etc.
- Sec. 957. Reports of such Investigations may be Published but may not be Used in Damage Suits.

## CHAPTER LVI.

## ADAMSON LAW.

- Sec. 958. Eight Hours shall be Deemed Day's Work for Purpose of Reckoning Compensation of Interstate Employees.
- Sec. 959. Railroads and Employees Excepted from the Provisions of the Statute.
- Sec. 960. President Empowered to Appoint Commission to Observe Operation and Effect of Eight Hour Wage Law.
- Sec. 961. Wages of Railway Employees Subject to Statute not to Be Reduced Pending Report of Commission.
- Sec. 962. Penalty for Violation of the Adamson Act.
- Sec. 963. Adamson Act a Valid Exercise of the Power of Congress Under the Commerce Clause.

## APPENDIXES

## Appendix A

The Act to Regulate Commerce as Amended.

## Appendix B

The Elkins Act.

## Appendix C

The Federal Bill of Lading Act.

## Appendix D

The Act Providing for Federal Control of Transportation Systems During War.

## Appendix E

Rules of Practice before the Commission in Proceedings under the Act to Regulate Commerce.

## Appendix F

The Federal Employers' Liability Act as Amended.

## Appendix G

Federal Safety Appliance Act as Amended.

## Appendix H

Orders of Interstate Commerce Commission under Safety Appliance Act.

## Appendix I

The Federal Hours of Service Act.

## Appendix J

The Federal Boiler Inspection Act.

## Appendix K

Rules and Orders of Interstate Commerce Commission under Boiler Inspection Act.

## Appendix L

The Federal 28-Hour Live Stock Law.

## Appendix M.

The Federal Ash Pan Act.

## Appendix N

The Federal Accident Reports Act.

## Appendix O

The Adamson Law

## Appendix P

The Transportation of Explosives Act.

## Appendix Q

General Orders of Director General of Railroads Under Federal Control Act of 1918.





## PART ONE

---

### FEDERAL AND STATE CONTROL OVER COMMON CARRIERS.



# FEDERAL AND STATE CONTROL OVER COMMON CARRIERS.

---

## CHAPTER 1.

### THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION

- Sec. 1. Congress Vested with Authority to Regulate All Interstate and Foreign Commerce.
- Sec. 2. Early Judicial Construction of the Commerce Clause—*Gibbons v. Ogden*.
- Sec. 3. Judicial Definitions of Term "Interstate Commerce" as Used in the Federal Constitution.
- Sec. 4. Transportation from one State to Another an Essential Element of Interstate Commerce.
- Sec. 5. Congressional Grant "to Regulate" Commerce Defined and Explained.
- Sec. 6. Importation of Legitimate Articles of Commerce from one State to Another Immune from State Legislation.
- Sec. 7. Commencement and Termination of Protection of the Commerce Clause—Original Package Rule.
- Sec. 8. States may Forbid Introduction or Exportation of all Articles not Legitimate Subjects of Trade and Commerce.
- Sec. 9. Statutory Exceptions Empowering States to Regulate Interstate Shipments of Intoxicating Liquors.

§ 1. **Congress Vested with Authority to Regulate All Interstate and Foreign Commerce.** Following its ratification by the states, the Constitution of the United States became effective on the first Wednesday in March, 1789. One of the provisions of that historic document, which was destined to have a far-reaching effect in the exercise of federal control within the states, was the clause in Section 8 of Article 1 which provides that "The Congress shall have the power \* \* \* to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." The authority thus delegated to the legislative department of the federal government to regulate interstate and

foreign commerce, was perhaps the most benign gift of the constitutional convention to the nation; for, under the Articles of Confederation, the individual states, finding themselves in the unlimited possession of power over their own governments, passed iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations fatal to the interest of the country at large.

Before the adoption of the federal constitution, the several states frequently exacted duties upon goods in transit within their boundaries destined for other states and foreign countries. The evils resulting from these conflicting regulations of the several states became so flagrant that they threatened the dissolution of the confederacy. The causes which led to the adoption of the commerce clause were thus described by Chief Justice Marshall:<sup>1</sup> "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the

1. *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678.



mischief, and should comprehend all foreign commerce and all commerce among the States.”

**§ 2. Early Judicial Construction of the Commerce Clause—Gibbons v. Ogden.** The judicial construction of the interstate commerce clause of the national Constitution by the United States Supreme Court commenced with the case of *Gibbons v. Ogden*<sup>2</sup> in 1824 in which Chief Justice Marshall wrote the opinion. This great and famous case established the supremacy of federal laws over state statutory enactments when dealing with matters pertaining to interstate and foreign commerce. The question before the court was the validity of a law of the state of New York giving to Livingston and Fulton the exclusive right to navigate the waters of that state by steamboat for a term of years. Basing his right upon this statute, Ogden, an assignee of the rights of Fulton and Livingston, filed a bill in chancery in the New York courts to restrain Gibbons, who owned steamboats running between Elizabethtown, N. J., and New York City, from navigating the waters within the territory of the state of New York. Gibbons alleged in his answer that his boats were duly enrolled and licensed to be employed in the coasting trade under an act of Congress passed in 1793, providing for enrolling and licensing ships and vessels to be employed in the coasting trade and for regulating the same. The injunction was awarded, and, on final hearing, made perpetual, the state courts, both trial and appellate, being of the opinion that the act was not repugnant to the Constitution of the United States or federal statutes enacted pursuant thereto.

Such was the first historic clash between state and federal authority submitted to the national Supreme Court. It fell to a Virginian and a southerner on the bench to proclaim the doctrine that national laws pertaining to subject matters delegated by the Consti-

2. *Gibbons v. Ogden*, 9 Wheat.  
(U. S.) 1, 6 L. Ed. 23.

tution to Congress are supreme in their sphere and that when state laws come into conflict with an act of Congress enacted in pursuance to the Constitution, they do not affect the subject matter and each other like equal opposing powers, but the federal is exclusive and supreme. "The subject to which the power is next applied," said Chief Justice Marshall, "is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce

of a State, then, may be considered as reserved for the State itself. \* \* \* Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States,' or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, interfere with, or are contrary to the laws of congress, made in pursuance of the constitution, or

some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

§ 3. **Judicial Definitions of Term "Interstate Commerce"** as Used in the Federal Constitution. The words "commerce among the states," found in the third paragraph of section 8 of article 1 of the federal Constitution are not defined in that instrument. As new agencies of commerce and modes of business between the states are developed and discovered which were unknown to former generations, no adequate and exact definition of the phrase is possible; but its meaning has been fairly established and can be arrived at from the inclusive and exclusive definitions which have been given it from time to time in the decisions of the national courts. That the term "commerce" should be confined to its primary and etymological meaning—exchange of or trade in goods, wares and merchandise—was early rejected by the Supreme Court with the comment that it was something more than the mere traffic in goods, that it described the commercial intercourse between nations, and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse.<sup>3</sup>

Every negotiation, contract, trade or dealing between citizens of different states which contemplates and causes importation from one state to another, whether it be of goods, persons or information, is a transaction of interstate commerce.<sup>4</sup> A definition

3. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

4. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. 564, 35 L. R. A. (N. S.) 1193; *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. Ed. 678, 30 Sup. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103;

*Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Champion v. Ames*, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321; *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. 229; *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 47 L. Ed. 333, 23 Sup.



frequently approved is the following: "Commerce with foreign countries and among the states strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and the transit of persons and property, as well as the purchase, sale and exchange of commodities." The term comprehends not only the exchange and transportation of persons, commodities or visible tangible things, but also the transmission by telegraph and

Ct. 214; *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126, 44 L. Ed. 400, 20 Sup. Ct. 325; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96; *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. 40; *United States v. Joint-Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; *Henderson Bridge Co. v. Com.*, 166 U. S. 150, 41 L. Ed. 953, 17 Sup. Ct. 532; *Western U. Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934; *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249; *Covington & C. Bridge Co. v. Com.*, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. Ed. 672, 12 Sup. Ct. 806; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. 958; *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391, 10 Sup. Ct. 881; *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 9 Sup. Ct. 6; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689; *Western U. Tel.*

*Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. 1118; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527; *Welton v. State*, 91 U. S. 275, 23 L. Ed. 347; *Chicago & N. W. Ry. Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. Ed. 710; *Philadelphia & R. R. Co. v. Com.*, 15 Wall. (U. S.) 232, 21 L. Ed. 146; *United States v. Tucker*, 188 Fed. 741; *Butler Bros. Shoe Co. v. United States Rubber Co.*, 84 C. C. A. 167, 156 Fed. 1.

5. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96; *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391, 10 Sup. Ct. 881; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 9 Sup. Ct. 6; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

telephone of ideas, wishes, orders and intelligence.<sup>6</sup> If any commercial transaction reaches an entirety in two or more states, and if the parties dealing with reference to that transaction deal from different states, then the whole transaction is a part of interstate commerce of the United States.<sup>7</sup> No trade can be carried on between the states to which the power of Congress to regulate interstate commerce does not extend.<sup>8</sup> For example, a contract for the sale of merchandise which contemplates the transportation of such merchandise from one state to another, is a transaction of interstate commerce.<sup>9</sup>

**§ 4. Transportation from one State to Another an Essential Element of Interstate Commerce.** While commerce between the states covers a multitude of transactions and subject matters, actual transportation of either persons or property or transmission of intelligence, from a point in one state to a point in another or to a foreign country by land or water, is an essential element of the commerce within federal control.<sup>10</sup> An

6. *Champion v. Ames*, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321; *Ratterman v. Western U. Tel. Co.*, 127 U. S. 411, 32 L. Ed. 229, 8 Sup. Ct. 1127; *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126.

7. *In re Charge to Grand Jury*, 151 Fed. 834; *United States v. Swift & Co.*, 122 Fed. 529.

8. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364.

9. *Royster Guano Co. v. Cole*, 115 Me. 387, 99 Atl. 33.

10. *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 58 L. Ed. 332, 34 Sup. Ct. 167; *United States Fidelity & Guaranty Co. of Baltimore v. Com.*, 231 U. S. 394, 58 L. Ed. 283, 34 Sup. Ct. 122; *International Text Book Co.*

*v. Pigg*, 217 U. S. 91, 54 L. Ed. 678, 30 Sup. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Ware & Leland Co. v. Mobile County*, 209 U. S. 405, 52 L. Ed. 855, 28 Sup. Ct. 526, 14 Ann. Cas. 1031; *Fairbank v. United States*, 181 U. S. 283, 45 L. Ed. 862, 21 Sup. Ct. 648; *Williams v. Fears*, 179 U. S. 270, 45 L. Ed. 186, 21 Sup. Ct. 128; *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, 19 Sup. Ct. 40; *Noble v. Mitchell*, 164 U. S. 367, 41 L. Ed. 472, 17 Sup. Ct. 110; *Hooper v. State*, 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. 207; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, 12 Sup. Ct. 250; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592; *Philadelphia Fire Ass'n. v. People*, 119 U. S. 110, 30 L. Ed. 342, 7 Sup. Ct. 108; *Hanni-*

agent of a railroad company, for example, residing in San Francisco and soliciting passengers for a railroad running between Chicago and New York, was held to be engaged in interstate commerce.<sup>11</sup> A "drummer" engaged in taking orders for goods from samples for his employer in another state, is engaged in interstate commerce when such orders are transmitted to the other state and the sale is consummated by the transportation of the property to the buyer.<sup>12</sup> Intercourse between a text-book company conducting a correspondence school, and its agents and scholars in other states, which involved the transportation of books, apparatus and papers from the state where the school was located to the state where the students resided, constituted commerce between the states.<sup>13</sup> The carriage from one state to another of lottery tickets, is within the federal commerce clause.<sup>14</sup> Persons travelling from place to place within a state taking orders for the delivery of goods and transmitting them to the manufacturer in another state to be delivered in fulfillment of such orders, and which are in fact shipped and delivered to the persons ordering them, are engaged in interstate

bal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527.

11. McCall v. California, 136 U. S. 104, 34 L. Ed. 391, 10 Sup. Ct. 881.

12. Davis v. Com., 236 U. S. 697, 59 L. Ed. 795, 35 Sup. Ct. 479; Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. Ed. 974, 34 Sup. Ct. 493; Browning v. City of Waycross, 233 U. S. 16, 58 L. Ed. 828, 34 Sup. Ct. 578; Banker Bros. Co. v. Commonwealth, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. 38; Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. 229; Stockard v. Morgan, 185 U. S. 27, 46 L. Ed. 785, 22 Sup. Ct. 576; Emert v. State, 156 U. S. 296, 39 L. Ed.

430, 15 Sup. Ct. 367; Ficklen v. Shelby County Taxing Dist., 145 U. S. 1, 36 L. Ed. 601, 12 Sup. Ct. 810; Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. Ed. 637, 9 Sup. Ct. 256; Asher v. Texas, 128 U. S. 129, 32 L. Ed. 368, 9 Sup. Ct. 1; Leloup v. Port of Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380; Corson v. Maryland, 120 U. S. 502, 30 L. Ed. 699, 7 Sup. Ct. 655; Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592.

13. International Text-Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678, 30 Sup. Ct. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

14. Lottery Case, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321.

commerce.<sup>15</sup> The transportation of natural gas from one state to another is interstate commerce.<sup>16</sup>

But, on the other hand, policies of insurance issued by a company in one state to a person in another state, do not constitute interstate commerce transactions although the premiums thereon are transmitted from one state to another, for policies of insurance are not the subject of trade and barter and are not commodities to be shipped or forwarded from one state to another.<sup>17</sup> Similarly brokers who take orders on commission for the purchase and sale of grain or cotton,

15. *Rogers v. State*, 227 U. S. 401, 57 L. Ed. 569, 33 Sup. Ct. 298; *Crenshaw v. State*, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. 294; *Dozier v. State*, 218 U. S. 124, 54 L. Ed. 965, 30 Sup. Ct. 649, 28 L. R. A. (N. S.) 264.

16. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. 564, 35 L. R. A. (N. S.) 1193; *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080; *State ex rel. Corwin v. Indiana & Ohio Oil, Gas & Mining Co.*, 120 Ind. 575, 6 L. R. A. 579, 22 N. E. 778.

17. *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 58 L. Ed. 332, 34 Sup. Ct. 167; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1116, 20 Sup. Ct. 962; *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. 207; *Philadelphia Fire Ass'n. v. People*, 119 U. S. 110, 30 L. Ed. 342, 7 Sup. Ct. 108; *Liverpool & L. Life & Fire Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029; *Ducat v. Chicago*, 10 Wall. 410, 19 L. Ed. 972; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357.

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of in-

demnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce." *Paul v. Virginia*, *supra*.



and transmit them to other states to be consummated, are not thereby engaged in interstate commerce when no actual shipments of grain from one state to another are involved.<sup>18</sup> Manufacture and production of commodities do not constitute interstate commerce transactions, for the function of manufacture is the transformation of raw material into a change of form for use, while commerce includes the buying and selling and the transportation incidental thereto of commodities from one state to another.<sup>19</sup> Persons engaged as agents in hiring laborers to be employed beyond the limits of the state are not thereby engaged in interstate commerce even though transportation must eventually take place as the result of such employment, because the business of hiring laborers is not so immediately connected with interstate transportation or traffic that it could be correctly said that those who followed it were engaged in interstate commerce.<sup>20</sup> Sales of stock and bonds which do not contemplate or have anything to do with the transportation of property from one state to another, are not interstate commerce transactions although the parties to such sales are residents of different states.<sup>21</sup> A broker dealing in foreign bills of exchange is not thereby engaged in foreign commerce within the commerce clause of the Constitution.<sup>22</sup> Per-

18. *Ware & Leland Co. v. Mobile County*, 209 U. S. 405, 52 L. Ed. 855, 28 Sup. Ct. 526, 14 Ann. Cas. 1031.

19. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. Ed. 328, 23 Sup. Ct. 206; *Capital City Dairy Co. v. State*, 183 U. S. 238, 46 L. Ed. 171, 22 Sup. Ct. 120; *Ad-dyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96; *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 9 Sup. Ct. 6; *Mugler v. State*,

123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. 273; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248.

20. *Williams v. Fears*, 179 U. S. 270, 45 L. Ed. 186, 21 Sup. Ct. 128.

21. *Brodnax v. State*, 219 U. S. 285, 55 L. Ed. 219, 31 Sup. Ct. 238; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. Ed. 415, 27 Sup. Ct. 188, 9 Ann. Cas. 736; *Rear-ick v. Com.*, 203 U. S. 507, 51 L. Ed. 295, 27 Sup. Ct. 159; *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382.

22. *Nathan v. Louisiana*, 8 How. (U. S.) 73, 12 L. Ed. 992.

sons engaged in the business of receiving deposits of money for safe keeping or for the purpose of transmission to other states and countries, are not engaged in foreign commerce, for the receiving of deposits which precedes it, must not be confounded with a later transmission of the money to foreign countries.<sup>23</sup>

**§ 5. Congressional Grant "to Regulate" Commerce Defined and Explained.** The power to regulate interstate and foreign commerce granted to Congress under the commerce clause, has been given a comprehensive meaning<sup>24</sup> and includes both regulation and prohibition.<sup>25</sup> It has been defined as the power to prescribe the rules by which commerce shall be governed, that is, the conditions upon which it shall be conducted.<sup>26</sup> It includes the power to provide the law for

23. *Engel v. O'Malley*, 219 U. S. 128, 55 L. Ed. 128, 31 L. Ed. 190.

24. *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. 180, L. R. A. 1917B 1218, Ann. Cas. 1917B 845; *Texas & P. Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Coppage v. State of Kansas*, 236 U. S. 1, 59 L. Ed. 441, 35 Sup. Ct. 240, L. R. A. 1915C 960; *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826, 52 L. R. A. (N. S.) 574; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621; *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211,

44 L. Ed. 136, 20 Sup. Ct. 96; *United States v. Joint-Traffic Ass'n.* 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25; *United States v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. 540; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572, 11 Sup. Ct. 865; *Wabash, St. L. & P. Ry. Co. v. People*, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; *Western U. Tel. Co. v. State*, 105 U. S. 460, 26 L. Ed. 1067; *Henderson v. Wickham*, 92 U. S. 259, 23 L. Ed. 543; *Welton v. State*, 91 U. S. 275, 23 L. Ed. 347.

25. *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E 905; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364; *Lottery Case*, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321.

26. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Austin v.*

the government of interstate commerce and to enact all appropriate legislation for the welfare of those who are immediately concerned,<sup>27</sup> and of the public at large;<sup>28</sup> to adopt measures to promote the growth of commerce and to insure its safety;<sup>29</sup> to prescribe the rules not only for the carrying on of commerce, but, in certain instances, to absolutely prohibit it;<sup>30</sup> to maintain the efficiency of interstate transportation upon fair terms and without molestation or hinderance.<sup>31</sup>

This power of regulation not only applies to interstate commerce itself, but extends to and embraces all the instrumentalities, agencies and means by which such commerce is carried on.<sup>32</sup> It is not confined to the instrumentalities and agencies of commerce as they were known or in use when the Constitution was adopt-

State, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; *United States v. Joint-Traffic Ass'n.*, 171 U. S. 505, 43 L. Ed. 259, 19 Sup. Ct. 25; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; *Pickard Pullman Southern Car Co.*, 117 U. S. 34, 29 L. Ed. 785, 6 Sup. Ct. 635; *Walling v. People*, 116 U. S. 446, 29 L. Ed. 691, 6 Sup. Ct. 454; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; *Webber v. Virginia*, 103 U. S. 334, 26 L. Ed. 565; *Gibbons v. Ogden*, 9 Wheat, (U. S.) 1, 6 L. Ed. 23.

27. *Wilson v. New*, 243, U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. 180. L. R. A. 1917B 1218, Ann. 1917B 845; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; *The Daniel Ball v. United States*, 10 Wall. 557, 19 L. Ed. 999.

28. *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed.

327, 32 Sup. Ct. 169, 38 L. R. A. (N. S.) 44.

29. *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

30. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364.

31. *Houston, East & West Texas Ry. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

32. *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2; *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564; *Western U. Tel. Co. v. State*, 105 U. S. 460, 26 L. Ed. 1067; *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L. Ed. 370; *The Daniel Ball v. United States*, 10 Wall. 557, 19 L. Ed. 999.

ed, but it extends from the sailing vessel to the steamboat,<sup>33</sup> from the stage-coach to the Pullman car,<sup>34</sup> from the messenger to the telegraph<sup>35</sup> and wireless,<sup>36</sup> from the ox-cart to the automobile,<sup>37</sup> and to all the new agencies of interstate commerce as they are successively brought to its aid.<sup>38</sup> The power of Congress to regulate commerce is complete in itself, is not dependent on and cannot be hampered by the action of the states, and is unrestrained by any qualification or limitation other than such as are prescribed in the Constitution itself.<sup>39</sup>

**§ 6. Importation of Legitimate Articles of Commerce from one State to Another Immune from State Legislation.** That portion or part of commerce with foreign countries and between the states which consists of the transportation and exchange of commodities, that is, the importation of legitimate articles of commerce from one state to another, is under the protection of the commerce clause of the federal constitution. All legitimate articles of commerce, therefore, moving from one state to another or to a foreign country are protected from hostile or interfering legislation of the states from the commencement of the transportation to the termination of the movement.<sup>40</sup> For, if mer-

33. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

34. *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 48 L. Ed. 134, 24 Sup. Ct. 39; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. 494; *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 29 L. Ed. 791, 6 Sup. Ct. 643.

35. *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92, 37 L. Ed. 380, 13 Sup. Ct. 485; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380.

36. Act approved June 18, 1910, 36 Stat. at L. 539.

37. *Hendrick v. State*, 235 U. S. 610, 59 L. Ed. 385, 35 Sup. Ct. 140.

38. *Pensacola Tel. Co. v. Wes-*

*tern U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

39. *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

40. *Rosenberger v. Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880, 36 Sup. Ct. 510; *Price v. People*, 238 U. S. 446, 59 L. Ed. 1400, 35 Sup. Ct. 892; *Adams Exp. Co. v. Com.*, 238 U. S. 190, 59 L. Ed. 1267, 35 Sup. Ct. 824, Ann. Cas. 1915D 1167; *Rossi v. Com.*, 238 U. S. 62, 59 L. Ed. 1201, 35 Sup. Ct. 677; *Kirmeyer v. State*, 236 U. S. 568, 59 L. Ed. 721, 35 Sup. Ct. 419; *Mutual Film Corporation of Missouri v. Hodges*, 236 U. S. 248, 59 L. Ed. 561, 35 Sup. Ct. 393; *Hey-*



chandise, recognized as legitimate articles of commerce and shipped in interstate or foreign commerce, can be subjected to any restrictions by state legislation before it is mingled with and becomes a part of the general

man v. Hays, 236 U. S. 178, 59 L. Ed. 527; 35 Sup. Ct. 403; People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549, 59 L. Ed. 355, 35 Sup. Ct. 162; South Covington & C. St. R. Co. v. City of Covington, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F 792; St. Louis Southwestern R. Co. v. State, 235 U. S. 350, 59 L. Ed. 265, 35 Sup. Ct. 99; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. Ed. 193, 35 Sup. Ct. 57; Browning v. City of Waycross, 233 U. S. 16, 58 L. Ed. 828, 34 Sup. Ct. 578; Stewart v. People, 232 U. S. 665, 58 L. Ed. 786, 34 Sup. Ct. 476; Ohio River & W. Ry. Co. v. Dittley, 232 U. S. 576, 58 L. Ed. 737, 34 Sup. Ct. 372; D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. 377; Louisville & N. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189; Dozier v. State, 218 U. S. 124, 54 L. Ed. 965, 30 Sup. Ct. 649, 28 L. R. A. (N. S.) 264; Adams Exp. Co. v. Com., 214 U. S. 218, 53 L. Ed. 972, 29 Sup. Ct. 633; Heymann v. Southern R. Co., 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. 104; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. Ed. 417, 25 Sup. Ct. 182; Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. 229; Austin v. State, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; Rhodes v. State, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664; Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, 1062.

"It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by Interstate Commerce remain under the shelter of the Interstate Commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State." Vance v. W. A. Vandercook Co., 179 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674.

"At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce." West v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. 564, 25 L. R. A. (N. S.) 1193.

"Those cases rested upon the broad principle of the freedom of commerce between the States and of the right of a citizen of one State to freely contract to receive merchandise from another State, and of the equal right of the citizen of a State to contract to send merchandise into other States." American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. Ed. 417, 25 Sup. Ct. 182.

property of the state, the object of investing the control in Congress over interstate and foreign commerce would be entirely destroyed.<sup>41</sup> It follows that the states cannot levy taxes on interstate and foreign commerce in any form by imposing it either upon the business which constitutes such commerce, or the privilege of engaging in it, or upon the receipts as such derived from it.<sup>42</sup> A person engaging in interstate commerce cannot be compelled by a state or municipality to take out a local license for the mere privilege of carrying on interstate or foreign commerce.<sup>43</sup>

41. *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826, 52 L. R. A. (N. S.) 574; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. 1118; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592; *Welton v. State*, 91 U. S. 275, 23 L. Ed. 347.

42. *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. 261; *People ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, 59 L. Ed. 355, 35 Sup. Ct. 162; *St. Louis Southwestern R. Co. v. State*, 235 U. S. 350, 59 L. Ed. 265, 35 Sup. Ct. 99; *Chicago, M. & St. P. R. Co. v. Iowa*, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592; *Baltic Min. Co. v. Massachusetts*, 231 U. S. 68, 58 L. Ed. 127, 34 Sup. Ct. 15; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 56 L. Ed. 445, 32 Sup. Ct. 218; *Pullman Co. v. State ex rel. Coleman*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 232; *Western U. Tel. Co. v. State, ex rel. Coleman*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 190; *Galveston, H. & S. A. R.*

*Co. v. State*, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. 638.

See also *General Railway Signal Co. v. Commonwealth*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 360; *Dalton Adding Machine Co. v. Commonwealth*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 361; *Ireland v. Woods*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 319; *Locomotive Co. v. Massachusetts*, 245 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 298; *International Paper Co. v. Commonwealth*, 245 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 292; *Looney v. Crane Co.*, 245 U. S. 178, 62 L. Ed. —, 38 Sup. Ct. 85; *Kansas City S. R. Co. v. Stiles*, 242 U. S. 111, 61 L. Ed. 176, 37 Sup. Ct. 58.

43. *Browning v. City of Waycross*, 233 U. S. 16, 58 L. Ed. 828, 34 Sup. Ct. 578; *Barrett v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203; *Crenshaw v. State*, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. 294; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 57 L. Ed. 189, 33 Sup. Ct. 41; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592.

This principle prohibiting the states from interfering with the transportation of legitimate articles of merchandise from one state to another, and establishing the freedom of interstate commerce, invalidates a state law levying a tax of one dollar on each person leaving a state;<sup>44</sup> a law requiring owners of vessels engaged in foreign commerce to pay to state officials a certain sum on account of every alien passenger brought from a foreign country into the state;<sup>45</sup> a state statute imposing a license upon importers for the privilege of selling imported goods;<sup>46</sup> a tax of a certain sum upon each ton of freight taken up within a state and carried out of it, or taken up outside of the state and delivered within it;<sup>47</sup> a state statute imposing a tax on bills of lading for gold or silver transported to any point without the state;<sup>48</sup> a license tax exacted by a state from dealers in goods shipped from other states, as a condition upon their sale;<sup>49</sup> a state law prohibiting certain kinds of cattle from being conveyed into a state between March 1 and November 1 of each year;<sup>50</sup> a law taxing "drummers" offering for sale or selling goods from another state by sample;<sup>51</sup> a state tax upon the gross receipts of companies engaged in interstate commerce;<sup>52</sup> a tax imposed upon the capital stock of ferry companies engaged in interstate commerce;<sup>53</sup> a city ordinance requiring a license of telegraph companies engaged in interstate commerce;<sup>54</sup> a state law placing a tax of one cent on every telegraphic message sent out

44. *Crandall v. State*, 6 Wall. (U. S.) 35, 18 L. Ed. 745.

45. *Passenger Cases*, 7 How. (U. S.) 283, 12 L. Ed. 702.

46. *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 6 L. Ed. 678.

47. *Philadelphia & R. R. Co. v. Com.*, 15 Wall. (U. S.) 232, 21 L. Ed. 146.

48. *Almy v. California*, 24 How. (U. S.) 169, 16 L. Ed. 644.

49. *Welton v. State*, 91 U. S. 275, 23 L. Ed. 347.

50. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

51. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592.

52. *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. 1118.

53. *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826.

54. *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380.

of the state;<sup>55</sup> a statute giving one telegraph company the exclusive right to transmit intelligence by telegraph over a certain portion of the territory of a state;<sup>56</sup> an ordinance requiring an express company to obtain a license as a condition precedent to engaging in the express business;<sup>57</sup> a municipal ordinance making it unlawful for an interstate street railroad company to permit more than one-third greater in number of the passengers to ride in its cars over and above a number for which seats were provided;<sup>58</sup> a law forbidding a person from bringing into the state cigarettes or cigarette paper;<sup>59</sup> a statute levying a charter fee of one-tenth of one per cent. of the authorized capital stock of companies engaged in interstate commerce.<sup>60</sup>

**§ 7. Commencement and Termination of Protection of the Commerce Clause—Original Package Rule.** The protection of the commerce clause against state legislation interfering with commodities moving in interstate and foreign commerce extends from the time the transportation begins and continues until it terminates.<sup>61</sup> Whenever an article of commerce has

55. *Western U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

56. *Pensacola Tel. Co. v. Western U. Tel. Co.* 96 U. S. 1, 24 L. Ed. 708.

57. *Barrett v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203.

58. *South Covington & C. St. R. Co. v. City of Covington*, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915 F 792.

59. *Austin v. State*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132.

60. *Pullman Co. v. State, ex rel. Coleman*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 232; *Western U. Tel. Co. v. State, ex rel. Coleman*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 190.

61. *Hall v. Geiger-Jones Co.*, 242

U. S. 539, 61 L. Ed. 480, 37 Sup. Ct. 217, L. R. A. 1917 F 514, Ann. Cas. 1917 C 643; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. 180, R. L. A. 1917 B 1218, Ann. Cas. 1917 B 845; *Rosenberger v. Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880, 36 Sup. Ct. 510; *Price v. People*, 238 U. S. 446, 59 L. Ed. 1400, 35 Sup. Ct. 892; *Rossi v. Com.*, 238 U. S. 62, 59 L. Ed. 1201, 35 Sup. Ct. 677; *Browning v. City of Waycross*, 233 U. S. 16, 58 L. Ed. 828, 34 Sup. Ct. 578; *McDermott v. State*, 228 U. S. 115, 57 L. Ed. 754, 33 Sup. Ct. 431, 47 L. R. A. (N. S.) 984; Ann. Cas. 1915A 39; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184, 33 Sup. Ct. 184, 33 Sup. Ct. 44; *Louisville*



begun to move from one state to another, commerce in that commodity among the states has commenced.<sup>62</sup> There must be a point of time when goods cease to be governed exclusively by the state law and begin to be governed and protected by the national law of commercial regulation, and the time of transition from state to federal control is the moment when they commence their final movement of transportation from the state of their origin to that of their destination.<sup>63</sup> Commodities moving in such commerce do not become subject to the control of the states until after the termination of the interstate movement, that is, after the arrival and delivery of the commodities and their sale in the original packages.<sup>64</sup> The states have, therefore, no power to stop an interstate shipment at the state

& N. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189; Dozier v. State, 218 U. S. 124, 54 L. Ed. 965, 30 Sup. Ct. 649, 28 L. R. A. (N. S.) 264; Adams Exp. Co. v. Com., 206 U. S. 129, 51 L. Ed. 987, 27 Sup. Ct. 606; Rearick v. Com., 203 U. S. 507, 51 L. Ed. 295, 27 Sup. Ct. 159; Cook v. Marshall County, 196 U. S. 261, 49 L. Ed. 471, 25 Sup. Ct. 233; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. Ed. 417, 25 Sup. Ct. 182; Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. 229; Austin v. State, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; Schollenberger v. Com., 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. 757; Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674; Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678.

62. The Daniel Ball v. United States, 10 Wall. (U. S.) 557, 19 L. Ed. 999.

63. Bay v. Merrill & Ring Logging Co., 243 U. S. 40, 61 L. Ed. 580, 37 Sup. Ct. 376; McCluskey v. Marysville & N. R. Co., 243 U. S. 36, 61 L. Ed. 578, 37 Sup. Ct. 374; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475.

64. Kirmeyer v. State, 236 U. S. 568, 59 L. Ed. 721, 35 Sup. Ct. 419; Adams Exp. Co. v. Com., 214 U. S. 218, 53 L. Ed. 972, 29 Sup. Ct. 633; Heymann v. Southern R. Co., 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. 104, 7 Ann. Cas. 1130; Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674; Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681; Bowman v. Chicago & N. W. Ry. Co., 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, 1062; Welton v. State, 91 U. S. 275, 23 L. Ed. 347.

In McDermott v. State, 228 U. S. 115, 57 L. Ed. 754, 33 Sup. Ct. 431, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915 A 39, the court said: "The term 'original package' had its origin in Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678, in which this court had to consider

line,<sup>65</sup> and a statute which denies the right to send a recognized article of commerce from one state to another, or substantially interferes with or hampers the same, is in conflict with the commerce clause.<sup>66</sup>

The right of transportation of an article of commerce from one state to another includes, by necessary implication, the right of the consignee to sell it in unbroken packages at the place where the transportation terminates.<sup>67</sup> The extent of the federal control over interstate commerce is well illustrated in *Caldwell v. North Carolina*,<sup>68</sup> wherein the court held that the agent of a foreign corporation, who, after receiving packages of frames and pictures from a carrier, fitted them together in a room in a hotel and then delivered them to those who had ordered them from the corporation, in another state, was engaged in interstate commerce and not subject to a tax upon the business of selling pictures, frames and photographs.

the extent of the protection given under Federal authority to articles imported into this country from abroad for sale, and it was there held that (p. 441); 'When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.' That doctrine has been many times applied in the decisions of this court in defining the line of demarcation which shall separate the Federal from the state authority where the sovereign power of the Nation or State is involved in dealing with prop-

erty. And where it has been found necessary to decide the boundary of Federal authority it has been generally held that, where goods prepared and packed for shipment in interstate commerce are transported in such commerce and delivered to the consignee and the package by him separated into its component parts, the power of Federal regulation has ceased and that of the State may be asserted."

65. *Rhodes v. State*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664.

66. *Kirmeyer v. State*, 236 U. S. 568, 59 L. Ed. 721, 35 Sup. Ct. 419.

67. *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572, 11 Sup. Ct. 865; *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681.

68. *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. 229.

But the scope of the interstate commerce clause is not such as to embrace acts and transactions which are local in their nature. For example, while the transportation of lightning rods from one state to another constitutes interstate commerce, the business of erecting lightning rods after the transportation is completed, is within the regulating power of the state and not the subject of interstate commerce, because the affixing of lightning rods to houses constitutes a business of a strictly local character peculiarly within the exclusive control of state authority and is wholly separate from interstate commerce.<sup>69</sup>

The "original package" doctrine which defines the line of demarcation between federal and state au-

69. *Browning v. City of Waycross*, 233 U. S. 16, 58 L. Ed. 828, 34 Sup. Ct. 578, in which the court said: "It is true, that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause. It is manifest that if the right here asserted were recognized or the power to accomplish by contract what is here claimed, were to be upheld, all lines of demarkation between National and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one State to the other and intended to be used after delivery in the construction of buildings or in the making of improvements in any form would or could be made interstate commerce. Of course

we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect, a suggestion however which we deem it unnecessary to do more than mention in order to refute it." See also *General Railway Signal Co. v. Commonwealth*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 360.

thority means that where goods are prepared and packed for shipment in interstate commerce and are transported in such commerce, the protection of the commerce clause attaches thereto and continues until after the arrival and delivery of the commodities and their sale by the consignee in the original packages in which the goods were shipped.<sup>70</sup> The term "original package" had its origin in *Brown v. Maryland*,<sup>71</sup> in which the court had to consider the extent of the protection given under federal authority to articles imported into the country from abroad for sale, and it was there held that "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with a mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

Subsequently, in *Leisy v. Hardin*,<sup>72</sup> it was held that the right to sell merchandise imported from another state in the original package, free from interference of state laws, was protected by the Constitution of the United States, as up to such sale, goods brought into the state were not commingled with the mass of property in the state. If, however, small packages are associated together in their shipment into a state, and are subsequently sold separately or in various lots, these separate packages, although respectively in the original envelopes, would not be within the rule in-

70. *Rosenberger v. Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880, 36 Sup. Ct. 510; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Heymann v. Southern R. Co.*, 203 U. S. 270, 51 L. Ed. 178, 27 Sup. Ct. 104, 7 Ann. Cas. 1130; *Cook v. Marshall County*, 196 U. S.

261, 49 L. Ed. 471, 25 Sup. Ct. 233; *Austin v. State*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132.

71. 12 Wheat. (U. S.) 419, 6 L. Ed. 678.

72. 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681.



voked, so as to escape a local law governing domestic transactions.<sup>73</sup> A contract, therefore, containing provisions for the sale of goods other than in the original packages imported, is subject to a state statute as it applies to transactions outside of the protection accorded by the federal Constitution to interstate commerce.<sup>74</sup> Where merchandise shipped in interstate commerce is delivered to the consignee and the package is by him separated into its component parts, the power of federal regulation has ceased and that of the state may be asserted.<sup>75</sup>

**§ 8. States may Forbid Introduction or Exportation of all Articles not Legitimate Subjects of Trade and Commerce.** While Congress has the exclusive right to regulate interstate and foreign commerce, a state, in the exercise of its police power, may provide local measures in the interest of the safety and welfare of its people, although such regulations incidentally or indirectly may involve or affect interstate and foreign commerce.<sup>76</sup> The limitations upon the police

73. *Price v. People*, 238 U. S. 446, 59 L. Ed. 1400, 35 Sup. Ct. 892; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184, 33 Sup. Ct. 44; *Austin v. State*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132.

74. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184, 33 Sup. Ct. 44.

75. *Cook v. Marshall County*, 196 U. S. 261, 49 L. Ed. 471, 25 Sup. Ct. 233; *May v. City of New Orleans*, 178 U. S. 496, 44 L. Ed. 1165, 20 Sup. Ct. 976.

76. *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, 35 Sup. Ct. 501; *Eubank v. City of Richmond*, 226 U. S. 137, 57 L. Ed. 156, 33 Sup. Ct. 76, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914 B 192; *Missouri Pac. R. Co. v. State ex rel. Taylor*, 216 U.

S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330; *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214; *Asbell v. State*, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485, 14 Ann. Cas. 1101; *Chicago, B. & Q. R. Co. v. People ex rel. Drainage Com'rs.*, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. 341; 4 Ann. Cas. 1175, *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92; *Smith v. St. Louis & S. W. Ry. Co.*, 181 U. S. 248, 45 L. Ed. 847, 21 Sup. Ct. 603; *Rasmussen v. State*, 181 U. S. 198, 45 L. Ed. 820, 21 Sup. Ct. 594; *Austin v. State*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; *Louisiana v. State*, 176 U. S. 1, 44 L. Ed. 347,

powers of a state are hard to define under the numerous decisions of the federal Supreme Court; but state authority embraces every law or statute which concerns the whole or any part of the people, whether it relates to their rights or duties in their public or private relation.<sup>77</sup>

The authority of the state to prescribe regulations which prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established; for such articles are not legitimate subjects of trade or commerce, and they are not, therefore, within the protec-

20 Sup. Ct. 251; *Lake Shore & M. S. Ry. Co. v. State*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, 1062; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. 1114; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819.

"It may also be admitted that the police powers of a State justifies the adoption of the precautionary measures against social evils. Under it a State may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in *The Passage Cases*, 7 How. 283, by Mr. Justice Greer, in the sacred law of self-defense. Vide 3 Sawyer 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the prop-

erty of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution." *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527.

"But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority." *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715.

77. *New York v. Miln*, 11 Pet. (U. S.) 102, 9 L. Ed. 648.

tion of the commerce clause of the federal constitution. They may be outlawed, and the self-protecting power of the state may rightfully be exerted against their introduction.<sup>78</sup> For example, a state law forbidding a delivery for shipment in both intrastate and interstate commerce, of any citrus fruits which were immature or otherwise unfit for consumption, was held to be a valid exercise of the police power of the state.<sup>79</sup>

A statutory enactment of a state forbidding anyone from having in his possession game birds, killed within the state, with the intention of procuring transportation of the same without the limits of the state, was held to be valid although interstate commerce was indirectly affected thereby.<sup>80</sup> Applying the same rule, it has been held that a state may prohibit the sale of imported game during the closed season therein, the law being sustained upon the ground that, while foreign commerce was incidentally involved, the state could prohibit the sale of such game in order to

78. *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Louisiana v. State*, 176 U. S. 1, 44 L. Ed. 347, 20 Sup. Ct. 251; *Geer v. State*, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. 600; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, 1062.

"The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleo-margarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale?

Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? \* \* \* Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States." *Plumley v. Com.*, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. 154.

79. *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, 35 Sup. Ct. 501.

80. *Geer v. State*, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. 600.

protect local game during the closed season.<sup>81</sup> A statute of a state passed to prevent deception in the manufacture of imitation butter was valid although the article for the sale of which the defendant was convicted in the state court, had been received by him from the manufacturers in another state as their agent, and had been sold by him in the original package.<sup>82</sup>

In the exercise of its police power, a state may require a person transporting food-stuffs from another state to disclose the ingredients contained therein.<sup>83</sup> A law of a state designed to prevent the introduction within its borders of diseased animals is valid in the absence of federal regulation governing the same subject matter.<sup>84</sup> "It is said that the defendant has a right," said the court in the Reid case, cited, "under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a state, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United

81. *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. 10.

82. *Plumley v. Com.*, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. 154.

83. *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. Ed. 1197, 32 Sup. Ct. 784, in which the court said: "It was competent for the State, in the exercise of its power to prevent imposition upon

the public, to require the disclosure to which objection is made. The provision was not an unreasonable one and the effect upon interstate commerce was incidental only."

84. *Asbell v. State*, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485, 14 Ann. Cas. 1101; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92.



States. Is the statute of Colorado liable to the objection just stated? Can the courts hold that upon its face it unreasonably obstructs the exercise of the general right secured by the Constitution to ship or send recognized articles of commerce from one State to another without interference by local authority? Those questions must be answered in the negative. The Colorado statute, in effect, declares that live stock coming, between the dates and from the territory specified, are, ordinarily, in such condition that their presence in the State may be dangerous to its domestic animals; and hence the requirement that before being brought or sent into the State they shall either be kept at some place north of the 36th parallel of north latitude for at least ninety days prior to their importation into the State, or the owner must procure from the State Veterinary Sanitary Board a certificate or bill of health that the cattle are free from all infectious or contagious diseases, and have not been exposed to any of said diseases at any time within ninety days prior thereto. As there is no evidence in the case as to the practical operation of this regulation upon shippers of cattle, as it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost, the court cannot assume arbitrarily that the State acted wholly without authority or that it unduly burdened the exercise of the privilege of engaging in interstate commerce. The accused seems to have been content to rest his defence upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the State to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the State enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce. As, there-

fore, the statute does not forbid the introduction into the State of all live stock coming from the defined territory—that diseased as well as that not diseased—but only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the State under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.”

**§ 9. Statutory Exceptions Empowering States to Regulate Interstate Shipments of Intoxicating Liquors.** Prior to the enactment of federal statutes commencing with the Wilson Act in 1890<sup>85</sup> a state was without power to control, regulate or legislate against the introduction of intoxicating liquors within its borders from other states until after the arrival and delivery of such commodities and their sale within the state in the original packages; for the courts uniformly held that intoxicating liquors were legitimate articles of commerce protected from hostile legislation of the states under the commerce clause until delivery to the consignee and a sale by him.<sup>86</sup> In those states, therefore, where the

85. Act of Aug. 8, 1890, 26 Stat. at L. 313, which is as follows: “That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or

Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”

86. *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681.

“To concede to a State the power to exclude, directly or indirectly, articles so situated,” said Chief Justice Fuller, “without congressional permission, is to concede to a majority of the people of a State, commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be

sale of intoxicating liquors was prohibited, the observance and the enforcement of such prohibitory laws were largely rendered futile because of the protection afforded persons selling liquor in the original package after delivery, when shipped from another state.

The Wilson Act provided that all intoxicating liquors transported into any state or territory or remaining there for use, consumption, sale, or storage, became, upon arrival in such state or territory, subject to the operation and the effect of laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors had been produced in such state or territory and were not exempt therefrom and by reason of being introduced therein in the original packages or otherwise. The purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the states as to intoxicating liquors, when the subject of such commerce, to exercise ampler power than could have been exercised before the enactment of the statute. Congress thereby established a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became commingled with the mass of other property in the state by a sale in the original package. The words in the statute "upon arrival in such state" were construed to mean that the state power could not attach to intoxicating liquors shipped in interstate commerce before arrival and delivery within the state to the consignee,

exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular in-

stance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in *Gibbons v. Ogden*, 9 Wheat. 1, 238, in 'a frank and candid co-operation for the general good.' The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitution of the United States."



but that the state control could be exercised before a sale in the original package after delivery.<sup>87</sup> Under the Wilson Act, as construed by the courts, shipments of intoxicating liquors in interstate commerce were not prohibited, but, on the contrary, were under the protection of the commerce clause until terminated by a delivery to the consignee.

The law governing interstate shipments of intoxicating liquors thus remained until the enactment of the Webb-Kenyon Act of March 1, 1913<sup>88</sup> which provides, in effect and in substance, that all shipments of intoxicating liquors from foreign countries, territories or other states into a state, which are intended to be received, possessed, sold or in any manner used either in the original package or otherwise, in violation of the law of such state, shall be prohibited. This statute has been held to be a valid exercise of the power of congress over interstate shipments of liquor.<sup>89</sup> The

87. *Rosenberger v. Pacific Exp. Co.*, 241 U. S. 48, 60 L. Ed. 880, 36 Sup. Ct. 516; *American Express Co. v. Iowa*, 196 U. S. 133, 49 L. Ed. 417, 25 Sup. Ct. 182; *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674; *Rhodes v. State*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664.

88. 37 Stat. at L. 699. The Webb-Kenyon Act is as follows:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United

States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

89. *United States. Seaboard Air Line Ry. Co. v. State*, 245 U. S. 238, 62 L. Ed. —, 38 Sup. Ct. 96; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. 180, L. R. A. 1917 B 1218, Ann. Cas. 1917 B 845.

*Iowa. State v. United States Exp. Co.*, 164 Iowa 112, 145 N. W. 451.



Webb-Kenyon Act was enacted for the purpose of extending that which was partly done by the Wilson Act, that is, its purpose was to prohibit the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce within the states contrary to their laws. Its effect was to withdraw the protection of the commerce clause of the federal constitution from interstate and foreign shipments of intoxicating liquors and to place them absolutely within the police powers of the state after they crossed the state line.<sup>90</sup> Under this statute if shipments of intoxicating liquors are intended to be used, possessed or sold in violation of a state law, their transportation may be prohibited by the state; but, on the other hand, if the liquor is not to be used, sold or received in violation of the law of the state, it remains under the protection of the commerce clause and its transportation may not be prohibited by the state.<sup>91</sup>

**Kansas.** *State v. Doe*, 92 Kan. 212, 139 Pac. 1169.

**Kentucky.** *Adams Exp. Co. v. Com.*, 160 Ky. 66, 169 S. W. 603.

**North Carolina.** *State v. Seaboard Air Line R. Co.*, 169 N. C. 295, 84 S. E. 283.

**South Carolina.** *Atkinson v. Southern Exp. Co.*, 94 S. C. 444, 48 L. R. A. (N. S.) 349, 78 S. E. 516.

**Texas.** *Ex Parte Peede*, 75 Tex. Cr. 247, 170 S. W. 749.

**Virginia.** *Taylor v. Com.*, 117 Va. 909, 85 S. E. 499.

90. **United States.** *West Virginia v. Adams Exp. Co.*, 135 C. C. A. 464, 219 Fed. 794.

**Alabama.** *Southern Exp. Co. v. State*, 188 Ala. 454, 66 So. 115.

**Arizona.** *Sturgeon v. State*, 17 Ariz. 513, L. R. A. 1917 B 1230, 154 Pac. 1050.

**Delaware.** *Van Winkle v. State*, 4 Boyce (Del.) 578, Ann. Cas. 1916 D 104, 91 Atl. 385.

**Kansas.** *Kansas City Breweries Co. v. Kansas City*, 96 Kan. 731, 153 Pac. 523; *State v. Missouri Pac. R. Co.*, 96 Kan. 609, Ann. Cas. 1917 A 612, 152 Pac. 777.

**Kentucky.** *Com. v. White*, 166 Ky. 528, 179 S. W. 469; *Adams Exp. Co. v. Crigler & Crigler Co.*, 161 Ky. 89, 170 S. W. 542; *Adams Exp. Co. v. Com.* 154 Ky. 462, 48 L. R. A. (N. S.) 342, 157 S. W. 908.

**Mississippi.** *American Exp. Co. v. Beer*, 107 Miss. 528, Ann. Cas. 1916 D 127, 65 So. 575.

**Tennessee.** *Palmer v. Southern Exp. Co.*, 129 Tenn. 116, 165 S. W. 236.

**Virginia.** *Bristol Distributing Co. v. Southern Exp. Co.*, 117 Va. 7, 83 S. E. 1084.

91. *Adams Exp. Co. v. Com.*, 238 U. S. 190, 59 L. Ed. 1267, 35 Sup. Ct. 824, Ann. Cas. 1915 D 1167, *Theo Hamm Brewing Co. v. Chi-*

Under a congressional enactment known as the Reed amendment to the Post Office Appropriation Bill,<sup>92</sup> it is provided, *inter alia*: "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid; provided that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state." Under this amendment shipments of intoxicating liquor from one state to another state wherein the manufacture or sale of intoxicating liquors is punished, is absolutely prohibited.

cago, R. I. & P. Ry. Co., 215 Fed. 672.

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the

prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the State to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution," *Adams Express Co. v. Kentucky*, *supra*.

92. Act of March 3, 1917, 39 Stat. at L. 162.

## CHAPTER II

### RESPECTIVE POWERS OF THE STATES AND NATIONAL GOVERNMENT OVER COMMON CARRIERS

- Sec. 10. Introductory.
- Sec. 11. General Principles Determining State and National Control Over Interstate Carriers and Transportation.
- Sec. 12. Foregoing Doctrines Illustrated and Applied to Divers Phases of Interstate Carriage and Transportation.
- Sec. 13. Federal Laws and Regulations Encroaching upon Powers of the State over Their Internal Affairs, Invalid.
- Sec. 14. Federal Regulation to be Valid Must Have Real or Substantial Connection with Interstate Commerce.
- Sec. 15. When Congressional Power may be Validly Exercised over Intrastate Subject Matters.
- Sec. 16. When Congress Legislates upon a Subject Matter of Commerce, State Laws Covering Same Field are Thereby Superseded.
- Sec. 17. Difficulty of Defining Field or Subject Matter Covered by Congressional Legislation.
- Sec. 18. Common Law Principles as Applied in State Courts Superseded as to Subject-Matters Covered by Federal Statutes.
- Sec. 19. Power of States to Regulate Interstate Rates of Carriers Formerly Upheld by Supreme Court—The Granger Cases.
- Sec. 20. State Control Over and Power to Regulate Rates and Charges on Interstate Shipments Denied.
- Sec. 21. Passenger Fares for Interstate Journeys Prescribed by Municipal Ordinances and Accepted by Carriers Invalid.
- Sec. 22. Power of States over Intrastate Commerce as Broad and Exclusive as Control of Congress over Interstate Commerce.
- Sec. 23. States May Regulate and Fix Reasonable Rates for Intrastate Transportation.
- Sec. 24. Statutes of States Regulating Delivery of Cars for Interstate Shipment Inoperative.
- Sec. 25. States may Compel Switch Connections with Private Side Tracks for Intrastate Business.
- Sec. 26. State Statutes Prescribing Rates Specified in Bill of Lading Void as to Interstate but Valid as to Intrastate Shipments.
- Sec. 27. State Laws and Decisions Governing Liability for Loss and Damage to Property Superseded by Carmack Amendment.
- Sec. 28. State Statute Authorizing Issuance of Transportation in Payment for Advertising Invalid.

- Sec. 29. States May Require Operation of Trains Between Intrastate Points on Interstate Lines—Limitations and Exceptions.
- Sec. 30. State and Municipal Regulations Prescribing Speed, Signals and Stoppage of Interstate Trains.
- Sec. 31. Georgia "Blow-Post" Law Invalid, Being a Direct Burden upon Interstate Commerce.
- Sec. 32. States May Compel Carriers to Make and Maintain Track Connections for Interchange of Traffic.
- Sec. 33. Validity of State Laws Providing for "Full Crews" on Interstate Trains.
- Sec. 34. State Regulations or Charges for Transportation by Water.
- Sec. 35. Statutory Enactments of States Requiring Facilities and Appliances on Interstate Trains.
- Sec. 36. Power of States over Interstate Employers and Employees in Absence of Federal Legislation.
- Sec. 37. Interstate Messages by Telegraph Prior to Amendment of 1910 to Act to Regulate Commerce.
- Sec. 38. State Laws Regulating Interstate and Foreign Messages of Telegraph, Telephone, and Cable Companies, Invalid.
- Sec. 39. States May Not Regulate "Ticker Service" of Interstate Telegraph Companies.
- Sec. 40. State and Municipal Regulations of the Interstate Business of Express Companies.
- Sec. 41. Valid Municipal Regulations of Drivers on Streets Carrying Interstate Traffic.

§ 10. **Introductory.** Under our dual form of government, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments which retain and exercise all powers not delegated to the Union, contests and clashes concerning their respective powers must constantly arise.

The sole authority of the federal government during times of peace over common carriers within the states is contained in the commerce clause of the Constitution, which provides that Congress may regulate interstate and foreign commerce. The federal government may not, therefore, regulate or control carriers engaged exclusively in intrastate commerce or even the intrastate business of interstate carriers; for all the attributes of a sovereignty not delegated to Congress by the commerce clause, have been retained by the states over common carriers operating within their borders and they may



exercise their power and control over all transportation exclusively within their boundaries to the same extent that the national government exercises over transportation from one state to another and to foreign countries.

In this chapter the author will discuss the principles determining the respective powers of the states and the national government during times of peace over interstate common carriers and transportation from one state to another and to foreign countries in the light of the controlling decisions of the federal Supreme Court. The power of the federal government over common carriers under the war clause of the constitution is considered in the next chapter.

**§ 11. General Principles Determining State and National Control Over Interstate Carriers and Transportation.** The respective powers of the states and the national government over subject matters included within the term "interstate commerce" or "commerce among the states" are divisible into three classes: first, those over which the power of Congress is exclusive and the states cannot regulate at all; second, those over which the states may regulate in the absence of legislation by Congress and, third, those over which the powers of the states are exclusive.

The first class includes those subject matters of interstate commerce which are national in their character and admit only of one uniform plan or system of regulation throughout the country. These are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. As to the subject matters of commerce between the states so requiring a general system or uniformity of regulation, the power of Congress is exclusive and any state legislation attempting to regulate them is void.<sup>1</sup> Even if not regulated by Congress,

1. *South Covington & C. St. R.* 537, 59 L. Ed. 350, 35 Sup. Ct. 158, *Co. v. City of Covington*, 235 U. S. L. R. A. 1915 F 792; *Simpson v.*

the nonaction of the national assembly is an expression of its will that the subjects therein included shall remain free from any control of the states. This principle underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce; for the states are not permitted to regulate or restrain that which, from its nature, should be under the control of one authority.

- Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 348 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A 18; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229; Crenshaw v. State, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. 294; Bacon v. People, 227 U. S. 504, 57 L. Ed. 615, 33 Sup. Ct. 299; Yazoo & M. V. R. Co. v. Greenwood Grocery Co., 227 U. S. 1, 57 L. Ed. 389, 33 Sup. Ct. 213; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; Louisville & N. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189; Meyer v. Wells, Fargo & Co., 223 U. S. 298, 56 L. Ed. 445, 32 Sup. Ct. 218; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 Sup. Ct. 633; Western U. Tel. Co. v. State, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 190; Pullman Co. v. State ex rel. Coleman, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 232; Galveston, H. & S. A. R. Co. v. State, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. 638; Mississippi R. Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 Sup. Ct. 90; Hanley v. Kansas City S. R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277; Schollenberger v. Com., 171 U. S. 1, 43 L. Ed. 49, 18 Sup. Ct. 757; Vance v. W. A. Vandercook Co., 170 U. S. 438, 42 L. Ed. 1100, 18 Sup. Ct. 674; Covington & C. Bridge Co. v. Com., 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087; Brennan v. City of Titusville, 153 U. S. 289, 38 L. Ed. 719, 14 Sup. Ct. 829; McCall v. California, 136 U. S. 104, 34 L. Ed. 391, 10 Sup. Ct. 881; Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681; Leloup v. Port of Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380; Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. 1118; Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592; Wabash, St. L. & P. Ry. Co. v. People, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; Case of State Freight Tax, 15 Wall. (U. S.) 232, 21 L. Ed. 146; Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. Ed. 449; The Daniel Ball v. United States, 10 Wall. (U. S.) 557, 19 L. Ed. 999; Passenger Cases, 7 How. (U. S.) 283, 12 L. Ed. 702; Crandal v. State, 6 Wall. (U. S.) 35, 18 L. Ed. 745; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579.

The second class includes those subject matters within the term "interstate commerce" which are of such a nature that, if regulated, they do not require or demand a general system or plan of uniform regulation throughout the nation, that is, those subject matters which admit of a diversity of regulation and control according to the special requirements of local conditions in each state. They include those matters of a local concern as to which it is impossible to derive from the constitutional grant of authority to Congress an intention that they should go uncontrolled pending federal legislation because of the necessity that they should not remain uncontrolled. Hence, in the absence of regulation by Congress as to such matters of local concern, the states may continue to supply the needed rules until Congress should decide to supersede them by national legislation.<sup>2</sup>

2. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661; 35 Sup. Ct. 304; *Atlantic Coast Line R. Co. v. State*, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829; *United States v. Pacific & A. Ry. & Nav. Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70, 57 L. Ed. 734, 33 Sup. Ct. 437; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176; *Southern Pac. Co. v. Schuyler*, 227 U. S. 601, 57 L. Ed. 662, 33 Sup. Ct. 277, 43 L. R. A. (N. S.) 901; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; *Southern R. Co. v. Burlington Lumber Co.*, 225 U. S. 99, 56 L. Ed. 1001, 32 Sup. Ct. 657; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. Ed.

1197, 32 Sup. Ct. 784; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Missouri R. Co. v. Castle*, 224 U. S. 541, 56 L. Ed. 875, 32 Sup. Ct. 606; *Mon-  
dou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169; 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Northern Pac. R. Co. v. State ex rel. Atkinson*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2; *Chicago, R. I. & P. R. Co. v. State*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275; *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272; *Chiles v. Chesapeake & O. R. Co.*, 218 U. S. 71, 54 L. Ed. 936, 30 Sup. Ct. 667, 20 Ann. Cas.

The third class includes matters limited to the internal commerce of the states over which the states have exclusive power. State legislation covering such subject matters is valid even though it may affect interstate commerce indirectly or incidentally. The national government has no power to deal with the internal concerns of the states. The states may, free from federal control, legislate as to intrastate commerce, provide local improvements, create and regulate local facilities and adopt protective measures of a reasonable character in the interest of the health, safety, morals and the welfare of their people although interstate commerce may thereby be incidentally or indirectly involved.<sup>3</sup>

980; *St. Louis Southwestern R. Co. v. State*, 217 U. S. 136, 54 L. Ed. 698, 30 Sup. Ct. 476, 29 L. R. A. (N. S.) 802; *Standard Oil Co. of Kentucky v. State ex rel. Cates*, 217 U. S. 413, 54 L. Ed. 817, 30 Sup. Ct. 543; *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 54 L. Ed. 708, 30 Sup. Ct. 463, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907; *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214; *Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141; *Martin v. Pittsburg & L. E. R. Co.*, 203 U. S. 284, 51 L. Ed. 184, 27 Sup. Ct. 100, 8 Ann. Cas. 87; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132; *Lake Shore & M. S. Ry. Co. v. State*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289; *Hennington v. State*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086; *Pearsall v. Great Northern Ry. Co.*,

161 U. S. 646, 40 L. Ed. 836, 16 Sup. Ct. 705; *Louisville & N. R. Co. v. State*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714; *Plumley v. Com.*, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. 154; *Johnson v. Chicago & P. Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447, 7 Sup. Ct. 254; *Turner v. State*, 107 U. S. 38, 27 L. Ed. 370, 2 Sup. Ct. 44.

3. *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833; *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *Missouri Rate Cases*, 230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220 U. S. 277, 55 L. Ed. 465, 31 Sup. Ct. 434; *Northern Pac. R. Co. v. State ex rel. McCue*, 216 U. S. 579, 54 L. Ed. 624, 30 Sup. Ct. 423; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277; *Louisville & N. R. Co. v. Com.*, 183 U. S. 503, 46 L. Ed. 298,



§ 12. **Foregoing Doctrines Illustrated and Applied to Divers Phases of Interstate Carriage and Transportation.** The business of an interstate carrier and the manifold parts and phases of interstate transportation are such that some of them fall within the first class mentioned in the foregoing paragraph and others are included within the second class. The line of distinction between the first two classes is a judicial question often of much difficulty, the solution of which is not to be found in any single and exact rule of decision. Adjudicated illustrations applying the general principles are hereinafter given.

A state has no power to levy a tax upon the gross receipts of a company derived from rates and fares for the transportation of persons and goods in interstate commerce;<sup>4</sup> to levy a tax upon a railroad company engaged in interstate commerce equal to one per cent

22 Sup. Ct. 95; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028; *Wabash, St. L. & P. Ry. Co. v. People*, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191; *Baltimore & O. R. Co. v. State*, 21 Wall. (U. S.) 456, 22 L. Ed. 678.

The rules stated in the text were thus succinctly summarized by Judge Bond in *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703: "(1) As to those subjects of interstate commerce which require a general system or uniformity of regulation, the power of Congress is exclusive whether exercised or not. This exclusive power results from the mere grant in the Constitution. (2) As to those sub-

jects which do not fall in this class, but, owing to local conditions, may be regulated by two authorities, the states may act until Congress does, but when Congress acts it obliterates all state legislation on the subject. In these cases the power of Congress becomes exclusive only when exerted.

(3) The reason for this distinction is that interstate commerce proper, requiring for its protection singleness of regulation, if regulated at all, must be regulated by that authority (Congress) to which the Constitution has granted the power. (4) As to subjects purely local and whose regulation does not directly or indirectly affect interstate traffic, full power to deal with them is reserved to the several states."

4. *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. 1118.

of its gross receipts;<sup>5</sup> to levy a graded charter fee upon the entire capital stock of a telegraph company engaged in interstate commerce as a condition of doing local business in the state;<sup>6</sup> to levy a tax in any form upon interstate commerce by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it;<sup>7</sup> cannot prevent telegraph companies transmitting messages from one state to another from operating lines over postal routes within their borders,<sup>8</sup> or impose unreasonable restrictions upon such companies;<sup>9</sup> cannot prescribe rates for interstate railroad transportation even with respect to that portion of the route within its boundaries,<sup>10</sup> or prescribe rates

5. *Galveston, H. & S. A. Ry. Co. v. State*, 210 U. S. 217, 52 L. Ed. 1031, 28 Sup. Ct. 638.

6. *Western U. Tel. Co. v. State ex rel. Coleman*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 190.

7. *Kansas City, Ft. S. & M. R. Co. v. Secretary of Kansas*, 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. 261; See also *St. Louis Southwestern R. Co. v. State*, 235 U. S. 350, 59 L. Ed. 265, 35 Sup. Ct. 99; *Baltic Min. Co. v. Com.*, 231 U. S. 68, 58 L. Ed. 127, 34 Sup. Ct. 15; *Bacon v. People*, 227 U. S. 504, 57 L. Ed. 615, 33 Sup. Ct. 299; *Crenshaw v. State*, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. 294; *United States Exp. Co. v. State*, 223 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. 211; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 56 L. Ed. 445, 32 Sup. Ct. 218; *Pullman Co. v. State ex rel. Coleman*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 232; *Kelly v. Rhoads*, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. 259; *Brennan v. City of Titusville*, 153 U. S. 289, 38 L. Ed. 719, 14 Sup. Ct. 829; *McCall v. California*, 136 U. S. 104, 34 L. Ed. 391, 10 Sup. Ct. 881; *Robbins v. Shelby County*

*Taxing Dist.*, 120 U. S. 489, 30 L. Ed. 694, 7 Sup. Ct. 592; *Case of State Freight Tax*, 15 Wall. (U. S.) 232, 21 L. Ed. 146.

8. *Western U. Tel. Co. v. Attorney General of Com. of Massachusetts*, 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. 961.

9. *Town of Essex v. New England Tel. Co. of Massachusetts*, 239 U. S. 313, 60 L. Ed. 301, 36 Sup. Ct. 102; *Western U. Tel. Co. v. City of Richmond*, 224 U. S. 160, 56 L. Ed. 710, 32 Sup. Ct. 449; *Western U. Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 49 L. Ed. 312, 25 Sup. Ct. 133, 1 Ann. Cas. 517; *Western U. Tel. Co. v. New Hope*, 187 U. S. 419, 47 L. Ed. 240, 23 Sup. Ct. 204; *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 43 L. Ed. 1162, 19 Sup. Ct. 778; *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92, 37 L. Ed. 380, 13 Sup. Ct. 485; *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

10. *Yazoo & M. V. R. Co. v. Greenwood Grocery Co.*, 227 U. S.

for transportation of traffic from one point to another in the same state but which, in transit, passes through the territory of another state,<sup>11</sup> or require a railroad company to stop through interstate passenger trains at a station when the local service otherwise offered is adequate and reasonable;<sup>12</sup> cannot prevent or hamper a foreign corporation from suing in its courts to collect the purchase price of merchandise which it lawfully sold in interstate commerce though it may be required to conform to the prevailing modes of procedure in the state courts;<sup>13</sup> cannot regulate the number of cars to be operated on a street railroad between two cities in different states;<sup>14</sup> cannot apply a long and short haul clause similar to Section 4 of the Interstate Commerce Act, to shipments from a place outside of the state to one within the state, and a shorter haul on the same line

1. 57 L. Ed. 389, 33 Sup. Ct. 213; Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 Sup. Ct. 633; Mississippi R. R. Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 Sup. Ct. 90; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. 491; Cleveland, C., C. & St. L. Ry. Co. v. People 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. 722; Covington & C. Bridge Co. v. Com., 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087; Wabash, St. L. & P. Ry. Co. v. People, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4.

11. Ewing v. City of Leavenworth, 226 U. S. 464, 57 L. Ed. 303, 33 Sup. Ct. 157; Hanley v. Kansas City S. R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; Crescent Brewing Co. v. Oregon Short Line R. Co., 24 Idaho 106. 132 Pac. 975.

12. Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 54 L. Ed. 970, 30 Sup. Ct. 633; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121; Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398; Mississippi R. Commission v. Illinois Cent. R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 Sup. Ct. 90; Lake Shore & M. S. Ry. Co. v. State, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465; Gladson v. State, 166 U. S. 427, 41 L. Ed. 1064, 17 Sup. Ct. 627; Illinois Cent. R. Co. v. State, 163 U. S. 142, 41 L. Ed. 107, 16 Sup. Ct. 1096.

13. Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. Ed. 193, 35 Sup. Ct. 57.

14. South Covington & C. St. R. Co. v. City of Covington, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F 792.



in the same direction between points within the state;<sup>15</sup> cannot compel an express company doing interstate business to take out a municipal license in order to carry on its interstate business;<sup>16</sup> cannot regulate the tolls for the conveyance of passengers on an interstate railroad from one state to another;<sup>17</sup> cannot authorize a municipal corporation to require a ferry company operating between two states to take out a license and pay a license fee as a condition to conducting its business;<sup>18</sup> cannot prescribe the rates for the transportation of property by railroad between two points in the same state when the property so carried is destined to a foreign country;<sup>19</sup> cannot compel a foreign corporation to file a statement with a state board before it can carry on interstate commerce in the state,<sup>20</sup> and cannot prohibit interstate trade in litigimate articles of commerce.<sup>21</sup>

On the other hand, *in the absence of action by Congress*, a state may prescribe reasonable rates for the transportation of traffic over the high seas between ports in the same state when not connected with transportation by rail;<sup>22</sup> may require railroad companies to furnish cars within a reasonable time after demand for interstate as well as for intrastate shipments;<sup>23</sup> may

15. *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. Ed. 416, 22 Sup. Ct. 277.

16. *Barrett v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203.

17. *Covington & C. Bridge Co. v. Com.*, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087.

18. *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826, 52 L. R. A. (N. S.) 574.

19. *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653.

20. *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 57 L. Ed. 189, 33 Sup. Ct. 41.

21. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 31 Sup. Ct. 564, 35 L. R. A. (N. S.) 1193; *Leisy v. Harden*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, 1062.

22. *Wilmington Transp. Co. v. Railroad Commission of California*, 236 U. S. 151, 59 L. Ed. 508, 35 Sup. Ct. 276.

23. *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760.



regulate liabilities of interstate carriers for loss and damage to interstate shipments;<sup>24</sup> may require railroad companies to place safety appliances upon freight and passenger cars within its boundaries although carrying interstate traffic;<sup>25</sup> may compel carriers to equip their locomotives with certain prescribed headlights;<sup>26</sup> may require carriers to heat their passenger cars although used in transporting interstate passengers;<sup>27</sup> may regulate wharfage charges although payment is also required of those engaged in interstate commerce;<sup>28</sup> may secure safety in the physical operation of railroads within its territory even though the trains carry interstate traffic;<sup>29</sup> may enact statutes requiring certain number of employes on freight trains;<sup>30</sup> may prohibit the shipment into other states of fruit unfit for consumption;<sup>31</sup> may make provisions for the ventilation and fumigation of street cars on a street railroad operated between two cities in different states

24. *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, Ann. Cas. 1916D 333.

25. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304; *Erie R. Co. v. People*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 265, Ann. Cas. 1915D 138.

26. *Atlantic Coast Line R. Co. v. State*, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829.

27. *New York, N. H. & H. R. Co. v. People*, 165, U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418.

28. *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 31 L. Ed. 149, 8 Sup. Ct. 113; *Parkersburg & O. River Transp. Co. v. City of Parkersburg*, 107 U. S. 691, 27 L. Ed. 584, 2 Sup. Ct. 732; *Cincinnati, P., B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Keokuk Northern*

*Line Packet Co. v. City of Keokuk*, Iowa, 95 U. S. 80, 24 L. Ed. 377.

29. *Atlantic Coast Line R. Co. v. State*, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829; *Missouri Pac. R. Co. v. State ex rel. Taylor*, 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330; *Hennington v. State*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28.

30. *St. Louis, I. M. & S. R. Co. v. State*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443; *Chicago, R. I. & P. R. Co. v. State*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275.

31. *Sligh v. Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, 35 Sup. Ct. 501; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. 10; *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 9 Sup. Ct. 6.

and require safety appliances on such cars;<sup>32</sup> may regulate the liability of railroad companies to their employes for injuries, including those engaged in interstate commerce;<sup>33</sup> may lawfully enact a statute providing that no contract, limiting the liability of a carrier to less than full loss for damage to a shipment, shall be valid even as to interstate shipments;<sup>34</sup> may fix reasonable rates for ferriage not connected with railroads, from its shore to the shores of another state as well as rates for return tickets from its shore;<sup>35</sup> may enact a statute requiring common carriers to settle claims for loss and damage to property transported, including interstate shipments;<sup>36</sup> may enforce a regulation requiring a railroad company to restore service of transferring cars between the lines of another railroad and an elevator in aid of intrastate and interstate commerce alike;<sup>37</sup> may allow attorney's fee for the failure of a carrier to pay within thirty days a bona fide claim for loss or damage to property, even as to interstate shipments;<sup>38</sup> may regulate the hours of service of employes of inter-

32. *South Covington & C. St. R. Co. v. City of Covington*, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F 792.

33. *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. Ed. 671, 35 Sup. Ct. 306; *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621; *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564.

34. *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383; *Pennsylvania*

*R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289.

35. *Port Richmond & B. P. Ferry Co. v. Board Chosen Freeholders County of Hudson*, 234 U. S. 317, 58 L. Ed. 1330, 34 Sup. Ct. 821.

36. *Atlantic Coast Line R. Co. v. Mazursky*, 216 U. S. 122, 54 L. Ed. 411, 30 Sup. Ct. 378.

37. *Missouri Pac. Ry. Co. v. Larabee Mills*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214.

38. *Missouri, K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. Ed. 1377, 34 Sup. Ct. 790, L. R. A. 1915E 942; *distinguishing Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

state carriers within its boundaries, although some are engaged in interstate commerce;<sup>39</sup> may authorize the collection of inspection fees for the purpose of determining the weight, condition, quality and quantity of merchandise to be sold within or without a state, if the amounts collected are not excessive and are in proper proportion to the service rendered and inspected;<sup>40</sup> may require interstate railroads owning terminal yards to interchange cars containing intrastate traffic with other carriers;<sup>41</sup> may legislate with respect to pilotage;<sup>42</sup> may improve harbors and construct dams and bridges across navigable rivers within its limits;<sup>43</sup> may prevent the spread of disease by the enforcement of quarantine regulations although interstate carriers are involved;<sup>44</sup> may prohibit the consolidation of a domestic railroad corporation with a competing line although both are interstate carriers;<sup>45</sup> may tax articles moving in interstate commerce when stopped in transit for a business purpose and thereby securing the protection of the state,<sup>46</sup> and may compel interstate carriers to stop

39. *Erie R. Co. v. People*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D 138.

40. *D. E. Foote & Co. v. Stanley*, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. 377.

41. *Grand Trunk R. Co. v. Michigan R. R. Commission*, 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152.

42. *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 56 L. Ed. 1047, 32 Sup. Ct. 626.

43. *Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525, 23 Sup. Ct. 472; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. 423; *Pound v. Turk*, 95 U. S. 459, 24 L. Ed. 525; *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713, 18 L. Ed. 96.

44. *Asbell v. State*, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485, 14 Ann. Cas. 1101; *Compagnie Francaise De Navigation a Vapeur v. Louisiana State Board of Health*, 186 U. S. 380, 46 L. Ed. 1209, 22 Sup. Ct. 811; *Louisiana v. State*, 176 U. S. 1, 44 L. Ed. 347, 20 Sup. Ct. 251; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488.

45. *Northern Securities v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Louisville & N. R. Co. v. State*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 40 L. Ed. 838, 16 Sup. Ct. 705.

46. *Susquehanna Coal Co. v. City of South Amboy*, 228 U. S. 465, 57 L. Ed. 1015, 33 Sup. Ct. 712.



their interstate trains if the service otherwise given is inadequate for local needs.<sup>47</sup>

§ 13. **Federal Laws and Regulations Encroaching upon Powers of the States over their Internal Affairs, Invalid.** The power of regulation conferred on Congress by the commerce clause, is limited to commerce with foreign nations, among the several states and with the Indian tribes. When, therefore, Congress undertakes to enact a statute which can only be valid as a regulation of commerce, it must be limited to the subject matters included within the commerce clause. If it is not so limited, it is in excess of the powers of Congress; for it is well-settled that as to all their internal affairs, the states retain their police powers, which they, as sovereign nations, possessed prior to the adoption of the national Constitution except such as were granted to the nation.<sup>48</sup>

If a national statute establishes a regulation applicable to all trade, or to commerce at all points, or attempts to govern commerce wholly between citizens of the same state, it is an exercise of a power not confided to Congress.<sup>49</sup> For example, Congress has no power to prohibit the sale of a particular commodity or to prohi-

47. *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 237 U. S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560.

48. *Covington & C. Bridge Co. v. Com.*, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087; *Patterson v. Com.*, 97 U. S. 501, 24 L. Ed. 1115; *United States v. Shauver*, 214 Fed. 154; *United States v. Boyer*, 85 Fed. 425.

49. *United States v. Barnow*, 239 U. S. 74, 60 L. Ed. 155, 36 Sup. Ct. 19; *Southern Ry. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304; *Illinois Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; *United States v. Sandoval*, 231 U. S. 28,

58 L. Ed. 107, 34 Sup. Ct. 1; *Ex Parte Webb*, 225 U. S. 663, 56 L. Ed. 1248, 32 Sup. Ct. 769; *Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141; *Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 51 L. Ed. 298, 27 Sup. Ct. 153; *James v. Bowman*, 190 U. S. 127, 47 L. Ed. 979, 23 Sup. Ct. 678; *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766, 7 Sup. Ct. 656, 763; *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. 18; *United States v. Harris*, 106 U. S. 629, 27 L. Ed. 290, 1 Sup. Ct. 601; *United States v. Fox*, 95 U. S. 670, 24 L. Ed. 538; *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *Karem v. United States*, 57 C. C. A. 486, 121 Fed. 250.



bit trade within the limits of a state;<sup>50</sup> nor may Congress require a license for the carrying on of the internal commerce of a state.<sup>51</sup> A congressional enactment prescribing the liability of an interstate carrier to those of its employees who are engaged wholly in intrastate commerce, or in work having no substantial connection with or real relation to interstate commerce, is beyond the power of the federal government.<sup>52</sup> A regulation prescribed by the Secretary of Agriculture under a federal statute authorizing him to prevent the spread of contagious and infectious diseases among livestock<sup>53</sup> applying to intrastate commerce, is invalid.<sup>54</sup> A federal statute, the provisions of which in effect entitled negroes to the equal enjoyment of all accommodations in hotels, public conveyances, theatres and other places of public amusement granted to white persons,<sup>55</sup> was void, because in excess of the power conferred upon Congress under the commerce clause and an encroachment upon the powers reserved to the states respectively.<sup>56</sup>

50. *United States v. Dewitt*, 9 Wall. (U. S.) 41, 19 L. Ed. 593, in which the court said: "That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."

51. *License Cases*, 5 How. (U. S.) 504, 12 L. Ed. 256; *License Tax Cases*, 5 Wall. (U. S.) 462, 18 L. Ed. 497.

52. *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52

L. Ed. 297, in which Mr. Justice White said: "The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

53. 32 Stat. at L. 791, Chap. 349.

54. *Illinois Cent. R. Co. v. McKendree*, 203 U. S. 514, 51 L. Ed. 298, 27 Sup. Ct. 153.

55. Act of March 1, 1875, 18 Stat. at L. 33, Chap. 114.

56. *Butts v. Merchants' & Miners' Transp. Co.*, 230 U. S. 126, 57 L. Ed. 1422, 33 Sup. Ct. 964; *Civil*

§ 14. **Federal Regulations to be Valid Must Have Real or Substantial Connection with Interstate Commerce.** The power of Congress under the commerce clause to regulate interstate commerce is not without other limitations. If a national law passed pursuant to the constitutional grant is not, in a real and substantial sense, a regulation of commerce, it is in excess of the constitutional power of Congress.<sup>57</sup> All rules prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated;<sup>58</sup> but when a particular subject matter is within the legislative power of Congress to regulate, the extent of the regulation depends upon the nature and character of the subject and what is appropriate to its regulation.<sup>59</sup> Congress, as an incident to its power to regulate commerce, may adopt not only

Rights Cases, 109 U. S. 3, 27 L. Ed. 835, 3 Sup. Ct. 18.

57. *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298.

58. *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 59 L. Ed. 939, 35 Sup. Ct. 551; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761, 51 L. R. A. (N. S.) 1097; *McDermott v. State*, 228 U. S. 115, 57 L. Ed. 754, 33 Sup. Ct. 431, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A 39; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364; *Adair v. United States*, 208 U. S. 161, 13 Ann. Cas. 764, 52 L. Ed. 436, 28 Sup. Ct. 277; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900; *McCulloch v. Maryland*, 4 Wheat (U. S.) 316, 4 L. Ed. 579.

59. *Caminetti v. United States*, 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192, L. R. A. 1915F 502, Ann. Cas. 1917B 1168; *Clark Dis-*

*tilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. 180, L. R. A. 1917B 1218, Ann. Cas. 1917B 845; *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E 905; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. 259; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7; *McLean v. State*, 211 U. S. 539, 53 L. Ed. 315, 29 Sup. Ct. 206; *Champion v. Ames*, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125.

means necessary but convenient to its exercise including means having the quality of police regulations.<sup>60</sup> For example, although the power to regulate commerce includes the power to prescribe the rules by which such commerce must be governed,<sup>61</sup> and a large discretion must necessarily be given to Congress to select the means to be employed in such regulation,<sup>62</sup> there is no substantial or real connection between a railroad employe's membership in a labor organization and the carrying on of interstate commerce, and hence, a federal statute prohibiting an interstate carrier from discharging an employe because of his membership in a labor organization, is invalid.<sup>63</sup>

On the other hand, a federal statute limiting the hours of service of employes engaged in interstate commerce is valid for the reason that the length of hours of service has a direct relation to the efficiency of the human agencies engaged in interstate commerce.<sup>64</sup> And so a statute requiring safety appliances on cars of railroads engaged in interstate commerce is valid because it tends to secure the safety of employes and travelers moving from one state to another.<sup>65</sup> Similarly, a federal

60. *Caminetti v. United States*, 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192, L. R. A. 1915F 502, Ann. Cas. 1917B 1168; *Wilson v. United States*, 232 U. S. 563, 58 L. Ed. 728, 34 Sup. Ct. 347; *Champion v. Ames*, 188 U. S. 321, 47 L. Ed. 492, 23 Sup. Ct. 321; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826.

61. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Almy v. California*, 24 How. (U. S.) 169, 16 L. Ed. 644.

62. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25

Sup. Ct. 158; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900; *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325, 15 Sup. Ct. 249; *In re Rahrer*, 140 U. S. 545, 35 L. Ed. 572, 11 Sup. Ct. 865; *Brown v. Maryland*, 12 Wheat (U. S.) 419, 6 L. Ed. 378.

63. *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764.

64. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621.

65. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Southern R. Co. v. Unit-*



statute fixing a temporary wage regulation between employers and employes engaged in interstate commerce is valid when the interstate commerce of the country was threatened with interruption through a strike because of the failure of the employers and employes to agree upon a scale of wages.<sup>66</sup> In upholding the validity of the Act of Congress, known as the Adamson law, which declared that eight hours shall, in all contracts for labor service, be deemed a days work and the measure or standard of a days work for the purpose of reckoning the compensation for services of employes employed in interstate commerce, Chief Justice White, in the cited case, said: "In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages, caused by the failure to exercise the private right as a result of the dispute between the parties,—that is, to exert the legislative will for the purpose of settling the dispute, and bind both parties to the duty of acceptance and compliance, to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inapplicable if the power was not possessed to meet a situation like the one with which the statute dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concern-

ed States, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2.

66. Wilson v. New, 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298.



ing a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in government to prevent all service from being destroyed? Further yet, what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employe and of the employes among themselves, and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident, and giving efficient remedies for that purpose. if there was no power to remedy a situation created by a dispute between employers and employes as to rate of wages, which, if not remedied, would leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages, because of a dispute on that subject between the employers and employes, by a legislative standard binding on employers and employes for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties? We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because

exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it."

**§ 15. When Congressional Power may be Validly Exercised over Intrastate Subject Matters.** Ordinarily the power of Congress covers only interstate commerce and an attempted regulation of intrastate commerce is invalid;<sup>67</sup> but, to this rule, there is a latter-day exception which was first recognized and adopted by the Supreme Court in 1911,<sup>68</sup> in holding that the Safety Appliance Act could be validly extended so as to include cars used exclusively in intrastate commerce, and further amplified and explained in 1914<sup>69</sup> when the Supreme Court further held that the Interstate Commerce Commission could control intrastate rates when necessary to prevent discrimination against interstate rates.<sup>70</sup>

The principle elucidated in these decisions is that whenever there exists such an interblending and interdependency between interstate and intrastate commerce that the freedom, well being, or safety of the former depends upon the latter, Congress, or an administrative body delegated with national authority, may regulate that intrastate commerce in so far as it is necessary

67. Section 13, *supra*.

68. *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2.

69. *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833.

70. Section 200, *infra*. See also *Illinois C. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 62 L. Ed. —, 38 Sup. Ct. 170; *American Express Company v. Caldwell*, 244 U. S. 617, 61 L. Ed. 1352, 37 Sup. Ct. 656.

to preserve the freedom, well being, or safety of the commerce within the exclusive control of the federal government. For example, cars containing interstate and intrastate traffic are hauled over the same line of railroad in the same trains and whatever hampers the movement of one will affect the movement of the other. Hence, there is such interdependence between cars in moving intrastate traffic and those used in moving interstate traffic that Congress may properly legislate and regulate safety appliances on all of them as long as they are used on highways of interstate commerce.<sup>71</sup>

**§ 16. When Congress Legislates upon a Subject Matter of Commerce, State Laws Covering Same Field are Thereby Superseded.** The national Constitution prescribes that the laws of the United States made pursuant to the provisions of the Constitution shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.<sup>72</sup> When Congress enacts a statute in pursuance of its power to regulate interstate commerce, laws and regulations of the states, covering the same subject matter, become inoperative in so far as they affect interstate commerce.<sup>73</sup> All laws of the states, therefore,

71. *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482, in which the court said: "We are therefore brought to the conclusion that the right of private action by an employe injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the

constitutional grant of authority over that subject."

72. Article 6 of the Constitution of the United States; *McCrary v. United States*, 195 U. S. 27, 49 L. Ed. 78, 24 Sup. Ct. 769, 1 Ann. Cas. 561; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *Missouri K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488.

73. *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Southern R. Co. v. Reid*, 222 U. S. 424, 55 L. Ed. 257, 32 Sup. Ct.



regulating the duties and liabilities of interstate carriers in so far as they attempt to cover the same field occupied by federal laws governing them, are superseded.<sup>74</sup> "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is para-

140; *Northern Pac. R. Co. v. Washington ex rel. Atkinson*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075.

74. *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665; *Armour & Co. v. State*, 240 U. S. 510, 60 L. Ed. 771, 36 Sup. Ct. 440, Ann. Cas. 1916D 548; *Western U. Tel. Co. v. Brown*, 234 U. S. 542, 58 L. Ed. 1457, 34 Sup. Ct. 955, 5 N. C. C. A. 1024; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D 138; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. Ed. 1155, 34 Sup. Ct. 761, 51 L. R. A. (N. S.) 1097; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 33 Sup. Ct. 383; *Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1917C 159; *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *United States v. Adams Exp. Co.*, 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878; *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *New York Cent. & H. River R. Co. v. Board Chosen Freeholders County of Hudson*, 227 U. S. 248,

57 L. Ed. 499, 33 Sup. Ct. 269; *Missouri, K. & T. R. Co. v. Harri-man*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Hampton v. St. Louis, I. M. & S. R. Co.*, 227 U. S. 456, 57 L. Ed. 596, 33 Sup. Ct. 263; *Yazoo & M. V. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, 57 L. Ed. 389, 33 Sup. Ct. 213; *Adams Ex. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Northern Pac. R. Co. v. State*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; *Western U. Tel. Co. v. Crovo*, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399; *Chicago, R. I. & P. R. Co. v. State*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275; *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214; *Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Western U. Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946; *State v. Missouri Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500.



mount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.'"<sup>75</sup>

§ 17. **Difficulty of Defining Field or Subject Matter Covered by Congressional Legislation.** While the principle that congressional action over interstate commerce renders state laws occupying the same field or dealing with the same subject matter inoperative, has been unquestionably established and repeatedly applied, the greatest difficulty in the practical administration of the law is to determine the exact boundary of the field or the extent of the subject matter covered.<sup>76</sup> If the state and the national law do not apply to the same subject matter, both are valid. If they cover the same field or subject matter, the state law must give way.

No phase of the law of interstate commerce has occasioned as many controversies as the effect of the enactment of a national statute upon similar state laws. The controversies have not been as to the principle involved, but as to its application to particular relations and conditions. For instance, prior to a controlling

75. *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564.

76. *City of Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826, 52 L. R. A. (N. S.) 574; *Port Richmond & B. P. Ferry Co. v. Board Chosen Freeholders County of Hudson*, 234 U. S. 317, 58 L. Ed. 1330, 34 Sup. Ct. 821; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Northern*

*Pac. R. Co. v. State ex rel. Atkinson*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; *Crossman v. Lurman*, 192 U. S. 189, 48 L. Ed. 401, 24 Sup. Ct. 234; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289.

decision of the United States Supreme Court,<sup>77</sup> it had been both affirmed<sup>78</sup> and denied<sup>79</sup> by respectable courts that by the enactment of the Federal Employers' Liability Act, all state workmen's compensation laws were inapplicable to interstate employes on railroads. Again, notwithstanding the passage of the Safety Appliance Act with its numerous amendments prescribing appliances on engines and cars of interstate railroads, the United States Supreme Court held that a state law requiring headlights on engines within a state, including interstate engines, was valid and did not cover the same field as the federal statute.<sup>80</sup> On the other hand, in another case, the same court held that the Safety Appliance Act covered the subject matter of equipment with safety appliances of all cars on interstate railroads whether engaged in intrastate or interstate commerce, so that a state law penalizing the movement of cars in intrastate commerce was invalid.<sup>81</sup>

**§ 18. Common Law Principles as Applied in State Courts Superseded as to Subject Matter Covered by Federal Statutes.** Whenever Congress enacts a statute regulating any phase of interstate commerce, the national act is then supreme and exclusive in its application. In construing and interpreting such statutes, state courts must follow the decisions of the national courts.<sup>82</sup> In addition, all federal statutes must be con-

77. *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546, 14 N. C. C. A. 680, Ann. Cas. 1917D 1139.

78. *Smith v. Industrial Acc. Commission of California*, 26 Cal. App. 560, 147 Pac. 600; *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A 450.

79. *Rounsaville v. Central R. Co.*, 87 N. J. L. 371, 94 Atl. 392; *Winfield v. New York Cent. & H. River R. Co.*, 216 N. Y. 284, 10 N. C. C. A. 916, Ann. Cas. 1916A 817, 110 N. E. 614; *Moore v. Lehigh*

*Valley R. Co.*, 169 N. Y. App. Div. 177, 154 N. Y. Supp. 620.

80. *Atlantic Coast Line R. Co. v. State*, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829. The effect of this decision was destroyed by the amendment of March 4, 1915 to the Federal Boiler Inspection Act, 36 Stat. at L. 913.

81. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304.

82. *United States v. Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct.

strued in the light of general principles of law and common law rules as applied and accepted in the federal courts. When, therefore, Congress legislates upon a subject matter of commerce controlled by state laws in the absence of national regulation, the principles of the common law as interpreted and applied by the state courts and applicable to the subject matter covered are also superseded, and the new statute must be interpreted in the light of common law rules as adopted in federal tribunals.<sup>83</sup>

State courts often fail to recognize that when a state law is superseded by congressional action over the same subject matter, the common law rules of the state dealing with the same subject and correlative matters are also superseded; but such is now the established doctrine. For example, in determining and applying to concrete facts the principles of common law negligence and assumption of risk in suits under the Federal Employers' Liability Act, the rules of the common law as interpreted in the federal courts con-

865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252.

**Kentucky.** Adams Ex. Co. v. Cook, 162 Ky. 592, 172 S. W. 1096; Cincinnati, N. O. & T. P. R. Co. v. Nolan, 161 Ky. 205, 10 N. C. C. A. 812, 170 S. W. 650.

**Missouri.** Security State Bank v. Simmons, 251 Mo. 2, 157 S. W. 585; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934; Haseltine v. Central Nat. Bank, 155 Mo. 66, 56 S. W. 895; Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202, 177 S. W. 1127; Bailey v. Missouri Pac. R. Co., 184 Mo. App. 457, 171 S. W. 44.

**Nebraska.** Hadley v. Union Pac. R. Co., 99 Neb. 349, 156 N. W. 765.

**North Carolina.** Dooley v. Seaboard Air Line R. Co., 163 N. C. 454, L. R. A. 1916E 185, 79 S. E. 970.

**Texas.** Gulf, C. & S. F. Ry. Co. v. Vasbinder, — Tex. Civ. App. —, 172 S. W. 763.

**Washington.** Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47, 155 Pac. 422.

83. Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; Southern Exp. Co. v. Byers, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, L. R. A. 1917A 197; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397.

trol in all actions, and must be followed.<sup>84</sup> If this principle were not enforced and applied, the uniformity which is always sought to be acquired by the passage of national legislation would be destroyed by a diversity of views among the state courts as to the common law rule applicable.

The doctrine is well illustrated in a case decided by the United States Supreme Court wherein the plaintiff attempted to recover damages for mental anguish due to a negligent delay in transporting a casket for his wife's funeral, being an interstate shipment. The Supreme Court of North Carolina affirmed a verdict for \$250 for his distress, following a common law rule of the state permitting a recovery in such cases for mental suffering; but the national Supreme Court held that the common law rules as applied in the federal courts controlled, and a recovery was denied.<sup>85</sup> In another case before the United States Supreme Court,<sup>86</sup> it appeared that a shipper sued a carrier for the loss of goods destroyed by fire while being held by the carrier as a warehouseman at the destination point, the shipment having originated in another state. Under the rules of the common law as interpreted in the state courts, when the plaintiff had shown that his goods were destroyed by fire, the burden of showing that the fire was not caused by negligence, was upon the defendant. But under the common law principles as applied in the federal courts, it is the duty of a warehouseman to deliver upon proper demand, and his failure to

84. *Southern Ry. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

*Contra Williams v. Pryor*, 272 Mo. 613, 200 S. W. 53. At the time

of the publication of this work, this case was pending in the federal supreme court on writ of certiorari.

85. *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, 2 L. R. A. 1917A 197.

86. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469.



do so, without excuse, is regarded as making a *prima facie* case of negligence. If, however, it appears that the loss is due to fire, that fact in itself is not sufficient to show negligence and the plaintiff must prove that issue. The state court applied the state rule, and in reversing the judgment obtained, Mr. Justice Hughes, for the court, said: "In the present case, it is undisputed that the loss was due to fire which destroyed the Company's warehouse with its contents including the property in question. The fire occurred in the early morning when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the Railway Company. The trial court denied the motion for a direction of a verdict and charged the jury that 'the burden of showing that there was no negligence is on the defendant.' Applying the rule established by the state decisions (*Brunson v. Atlantic Coast Line R. R.*, 76 So. Car. 9; *Fleischman v. Southern Railway*, 76 So. Car. 237; see also *Wardlaw v. S. C. R. R.*, 11 Rich. 337), the Supreme Court of the State overruled the defendant's objection and sustained the judgment. 99 So. Car. 242. It has been recognized by the state court, as was said in the *Fleischman Case*, *supra*, that the rule it applies is a 'somewhat exceptional rule' to which the court adheres 'notwithstanding the great number of opposing authorities in other jurisdictions.' 76 So. Car. 248. For the reasons we have stated, we think that the obligation of the Railway Company was not governed by the state law and that, in this view, the exceptions of the plaintiff in error were well taken."

**§ 19. Power of States to Regulate Interstate Rates of Carriers Formerly Upheld by Supreme Court—the Granger Cases.** That a state, in the absence of national legislation, possessed the power to fix and determine the rates and fares for the transportation of persons and property on railroads from within its boundary to points outside, and from other states to points with-

in its boundary, was formerly affirmed in several cases by the Supreme Court of the United States. The exercise of such authority, it was held, did not amount to a regulation of commerce among the states, for the reason that a state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its jurisdiction, even though in so doing, those outside might be indirectly affected. Thus, an act of the legislature of the state of Maryland fixing a maximum passenger fare of \$2.50 from Baltimore, Md. to Washington, D. C., was held to be valid and in no sense a restriction upon intercourse and traffic between the different states.<sup>87</sup> The same doctrine was reaffirmed in

87. *Baltimore & O. R. Co. v. State*, 21 Wall. (U. S.) 456, 22 L. Ed. 678. The following excerpt from the opinion in this case well illustrates the subsequent radical change in the views of the court as to the validity of such state regulations: "The question is, whether such a stipulation is, or is not, a violation of the Constitution of the United States, as being a restriction of free intercourse and traffic between the different states. That the road is one of the principal thoroughfares in the country for interstate travel is conceded, and, indeed, may be judicially assumed. As, however, nearly all the railroads in the country are, or may be, used to a greater or less extent as links in through transportation, this road cannot in principle be regarded as an exceptional one in that respect. Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional

powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted, was entirely performed on common roads, and in vehicles drawn by animal power. No one

1876 when the Granger cases were decided.<sup>88</sup> In these cases the court upheld the validity of statutes of the states of Iowa, Illinois, Wisconsin and Minnesota, which, according to their terms, also applied to traffic passing out of and coming into those states respectively. For example, the statute of Wisconsin fixed the maximum fares and rates to be charged by a railroad for the transportation of persons and property carried within the state, or taken up outside of the state and brought within it, or taken up inside and carried without. In

at that day imagined that the roads and bridges of the country (except when the latter crossed navigable streams) were not entirely subject, both as to their construction, repair, and management, to State regulation and control. They were all made either by the States or under their authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned. No one then supposed that the wagons of the country, which were the vehicles of this commerce, or the horses by which they were drawn, were subject to National regulation. The movement of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other States as to the citizens of the State in which it was performed, was not regarded as unconstitutionally restricted and trammelled by tolls exacted on bridges or turnpikes, whether belonging to the State or to private persons. And when, in process of time, canals were constructed, no amount of tolls which was exacted thereon by the State or the companies that owned them, was ever regarded as an infringement of the Constitution. When constructed by the State itself, they might

be the source of revenues largely exceeding the outlay without exciting even the question of constitutionality. So when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of rapid and all-absorbing transportation, no one imagined that the State, if itself owner of the work, might not exact any amount whatever of toll or fare or freight, or authorize its citizens or corporations, if owners, to do the same. Had the State built the road in question it might, to this day, unchallenged and unchallengeable, have charged two dollars and fifty cents for carrying a passenger between Baltimore and Washington. So might the railroad company, under authority from the State, if it saw fit to do so. These are positions which must be conceded. No one has ever doubted them."

88. *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 99; *Peik v. Chicago & N. W. Ry. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Chicago, B. & Q. Ry. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.



deciding that such statutes were not invalid under the commerce clause as an attempted regulation of interstate commerce, the court, in one of the cases, said: "As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

**§ 20. State Control Over and Power to Regulate Rates and Charges on Interstate Shipments Denied.** Finally the uncertainty as to the power and control of the states over the rates and charges made by rail carriers for the transportation of passengers and freight in interstate and foreign commerce, was removed with the epochal decision of the national Supreme Court on October 25, 1886 in *Wabash, St. L. & P. Ry. Co. v. People*,<sup>89</sup> in which the court held that a state had no power to regulate fares, rates and tolls for the transportation of freight and passengers from one state to another including even that part of the journey within its boundary.

In that case there came under review a statute of the state of Illinois providing that if any railroad company within that state, should charge or receive for transporting passengers or freight of the same class, the same or a greater sum for any distance than it did for a longer distance, it should be liable to a penalty for unjust discrimination. The railroad company in that case made such a discrimination in regard to goods

<sup>89</sup>. 118 U. S. 557, 30 L. Ed. 244,  
7 Sup. Ct. 4.



transported over the same road from Peoria, Ill., and from Gilman, Ill., to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer the city of New York than the latter, this difference being in the length of the line in the state of Illinois. The court held that the transportation was commerce among the states, even as to that part of the voyage which lay within the state of Illinois; that the regulation of such commerce was confided to Congress exclusively, under its power to regulate commerce between the states, and that the statute in question, being intended to regulate the transmission of persons or property from one state to another, was not within that class of legislation which the states may enact in the absence of legislation by Congress. "Let us see precisely," said the court, "what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, 'I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery.' So that while that carrier might be willing to carry these goods from

the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria. So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a car-load, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York. The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to transportation which includes Illinois in a long line of carriage through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules. Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may

be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be over-estimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution."

**§ 21. Passenger Fares for Interstate Journeys Prescribed by Municipal Ordinances and Accepted by Carriers Invalid.** While a municipal corporation may grant to or withhold from quasi public corporations the use of its streets, it cannot thereby indirectly control or regulate interstate commerce by attaching conditions relating thereto to the franchises of a corporation. For example, an interurban electric railroad, carrying passengers from St. Louis, Mo., to points in Illinois, accepted a franchise from the city which provided that the charge for a continuous passage for an adult passenger between any point in the city of St. Louis to any point in Grant City, Ill., should not exceed five cents. Such a provision in a city ordinance is in conflict with the Interstate Commerce Act giving the Interstate Commerce Commission the power to regulate

interstate fares.<sup>90</sup> "Not only has a railway company," said the Commission in the case cited, "a recognized right to earn a fair return on the value of the property which it devotes to the public service, but the interest of the public demands that carriers engaged in interstate commerce, if properly constructed and wisely managed, shall receive revenues which will enable them to keep their property and equipment in good repair and maintain their service at the highest possible point of efficiency. The interest of the public in this respect is paramount to the private rights of the parties, whether obtained by contract or otherwise, and in determining the reasonableness and the propriety of proposed rates or fares in investigations of this character the Commission can not consider its authority limited or its judgment controlled by the terms of private agreements which the carrier or carriers respondent may have made with other parties purporting to fix the measure of the rates in question. Admitting the correctness of the city's contention that a contract between a common carrier and a municipality differs in kind from a private contract between a carrier and a shipper for the establishment of a preferential rate, it is nevertheless clear that both kinds of contracts must be disapproved to the extent that they seek by special agreement to require the maintenance of rates or fares which are unreasonable, discriminatory, or unremunerative, or to the extent that they seek to lodge in other bodies the jurisdiction over interstate rates and fares which has been expressly conferred upon this Commission by federal law."

**§ 22. Power of States over Intrastate Commerce as Broad and Exclusive as Control of Congress over Interstate Commerce.** Subject to the limitation of the Fourteenth Amendment to the national Constitution<sup>91</sup> and

90. St. Louis, Missouri-Illinois Passenger Fares, 41 I. C. C. 584.      gia, 240 U. S. 324, 60 L. Ed. 669, 36 Sup. Ct. 260; O'Keefe v. United

91. Seaboard Air Line Ry. Co. v. Railroad Commission of Georgia, 240 U. S. 294, 60 L. Ed. 651, 36 Sup. Ct. 313; Chicago, M.



the doctrine of the *Shreveport case*,<sup>92</sup> the powers of a state over all the intrastate business and transportation services and facilities of carriers within its borders are as broad and as all-inclusive as the control of Congress over interstate transportation and the facilities and services connected therewith;<sup>93</sup> for the exclusive rights

& St. P. R. Co. v. State, 238 U. S. 491, 59 L. Ed. 1423, 35 Sup. Ct. 869, 1. R. A. 1916A 1133; *Great Northern R. Co. v. State ex rel. State Railroad & Warehouse Commission*, 238 U. S. 340, 59 L. Ed. 1337, 35 Sup. Ct. 753; *Northern Pac. R. Co. v. State ex rel. McCue*, 236 U. S. 585, 59 L. Ed. 735, 35 Sup. Ct. 429; *Florida East Coast R. Co. v. United States*, 234 U. S. 167, 58 L. Ed. 1267, 34 Sup. Ct. 867; *Chicago, M. & St. P. R. Co. v. State of Iowa*, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 535; *Missouri Pac. R. Co. v. State*, 217 U. S. 196, 54 L. Ed. 727, 30 Sup. Ct. 461, 18 Ann. Cas. 989; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 143; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115; *San Diego Land & Town Co. v. City of National City*, 174 U. S. 739, 43 L. Ed. 1154, 19 Sup. Ct. 804; *Lake*

*Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *Missouri Pac. R. Co. v. State*, 164 U. S. 403, 41 L. Ed. 489, 17 Sup. Ct. 130; *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702; *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 626, 6 Sup. Ct. 334, 388, 1191.

92. *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833. See also *Illinois C. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 62 L. Ed. —, 38 Sup. Ct. 170.

93. *Michigan Cent. R. Co. v. Michigan Railroad Commission*, 236 U. S. 615, 59 L. Ed. 750, 35 Sup. Ct. 422; *Grand Trunk R. Co. v. Michigan R. R. Commission*, 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152; *Southern Pac. Co. v. Campbell*, 230 U. S. 537, 57 L. Ed. 1610, 33 Sup. Ct. 1027; *Knott v. Chicago, B. & Q. R. Co.*, 230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916 A 18; *Oklahoma ex rel. West v. Chicago, R. I. & P. R. Co.*, 220 U. S. 302, 55 L. Ed. 474, 31 Sup. Ct. 442; *Oklahoma v. Atchison, T.*

and powers of the states over their own territories were established with the beginning of our government. The people of the united colonies in separating from Great Britain, changed the form, but not the substance of their government. As independent states, they retained, for the purposes of government, all the authority and

- & S. F. R. Co., 220 U. S. 277, 55 L. Ed. 465, 31 Sup. Ct. 234; Missouri Pac. R. Co. v. State ex rel. Taylor, 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330; General Oil Co. v. Crain, 209 U. S. 211, 52 L. Ed. 754, 28 Sup. Ct. 475; Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 11 Ann. Cas. 398, 51 L. Ed. 933, 27 Sup. Ct. 585; Seaboard Air Line Ry. Co. v. State ex rel. Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 Sup. Ct. 109; Atlantic Coast Line R. Co. v. State ex rel. Ellis, 203 U. S. 256, 51 L. Ed. 174, 27 Sup. Ct. 108; New Mexico ex rel. E. J. McLean & Co. v. Denver & R. G. R. Co., 203 U. S. 38, 51 L. Ed. 78, 27 Sup. Ct. 1; Chicago, B. & Q. R. Co. v. People ex rel. Drainage Com'rs. 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. 341, 4 Ann. Cas. 1175; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; Minneapolis & St. L. R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission, 193 U. S. 53, 48 L. Ed. 614, 24 Sup. Ct. 396; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115; Chicago, M. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. 581; Louisville & N. R. Co. v. State, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714; Pearsall v. Great Northern Ry. Co., 161 U. S. 646, 40 L. Ed. 838, 16 Sup. Ct. 705; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 Sup. Ct. 255; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702; Dow v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 Sup. Ct. 1028; Stone v. New Orleans & N. E. R. Co., 116 U. S. 352, 29 L. Ed. 651, 6 Sup. Ct. 349, 391; Stone v. Illinois Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 Sup. Ct. 348, 388, 1191; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191; Illinois Cent. R. Co. v. People, 108 U. S. 541, 27 L. Ed. 818, 2 Sup. Ct. 839; Ruggles v. People, 108 U. S. 526, 27 L. Ed. 812, 2 Sup. Ct. 832; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Peik v. Chicago & N. W. Ry. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, B. & Q. Ry. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94.

prerogatives of the Parliament of England. They continued to and do now possess and enjoy all of these same powers, except those which have been surrendered and delegated to the United States through the adoption of the national Constitution.<sup>94</sup>

Under the doctrines of the common law, whenever the owner of private property devotes that property to any use in which the public has an interest, or clothes or affects it with a public function, he, in effect, grants to the state and the public an interest in that use and must submit to be controlled by the state for the common good, to the extent of the interest he has thus created. Such is the pervading principle of state control early recognized by the United States Supreme Court.<sup>95</sup> It enables the states to regulate the business of all concerns within their boundaries when their property is employed in a manner which directly affects the body of the people. Common carriers, therefore, from the public nature of their business and the interest which the public has in their operation, are subject, as to all their intrastate business, to regulation and control by the states exactly as interstate carriers, as to their interstate traffic, are subject to the control of Congress.<sup>96</sup>

**§ 23. States May Regulate and Fix Reasonable Rates for Intrastate Transportation.** Although the Interstate Commerce Commission, under the Hepburn amendment of 1906, was empowered by Congress to prescribe maximum rates for interstate and foreign transportation, the states continued to possess full and complete authority to prescribe reasonable rates for exclusively internal traffic, that is, transportation

94. *Munn v. People*, 94 U. S. 113, 24 L. Ed. 77.

95. *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. Ed. 99; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24

L. Ed. 99; *Peik v. Chicago & N. W. Ry. Co.*, 94 U. S. 164, 24 L. Ed. 97; *Chicago, B. & Q. Ry. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

96. See authorities under note 93, *supra*.

beginning and ending within their limits. The decisions of the United States Supreme Court since the passage of the Interstate Commerce Act and all its amendments, have uniformly recognized that it was the exclusive province of a state to fix intrastate rates applicable throughout its territory.<sup>97</sup> The power of a state to prescribe rates for the transportation of passengers or property within its boundaries is not confined to a part of the state, but extends throughout the state, including its cities adjacent to its boundaries as well as those in the interior of the state.<sup>98</sup> As to interstate rates, the power of Congress is exclusive, and as to intrastate

97. *Chicago, M. & St. P. R. Co. v. State Public Utilities Commission of Illinois*, 242 U. S. 333, 61 L. Ed. 341, 37 Sup. Ct. 173; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; *Portland Railway, Light & Power Co. v. Railroad Commission of Oregon*, 229 U. S. 397, 57 L. Ed. 1248, 33 Sup. Ct. 820; *Northern Pac. R. Co. v. North Dakota ex rel. McCue*, 216 U. S. 579, 54 L. Ed. 624, 30 Sup. Ct. 423; *Missouri Pac. Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352, 29 Sup. Ct. 214; *Alabama & V. R. Co. v. Mississippi R. R. Commission*, 203 U. S. 496, 51 L. Ed. 289, 27 Sup. Ct. 163; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900; *Louisville & N. R. Co. v. Com.*, 183 U. S. 503, 46 L. Ed. 298, 22 Sup. Ct. 95; *Smyth v. Ames*, 171 U. S. 361, 43 L. Ed. 197, 18 Sup. Ct. 888; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. 418; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896; *St. Louis & S. F. R. Ry. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Reagan v. Mercantile Trust Co.*, 154 U. S.

418, 38 L. Ed. 1030, 14 Sup. Ct. 1062; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702; *Dow v. Beidelman*, 125 U. S. 630, 31 L. Ed. 841, 8 Sup. Ct. 1028; *Wabash, St. L. & P. Ry. Co. v. People*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191; *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, 29 L. Ed. 650, 6 Sup. Ct. 348, 388, 1191; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. Ed. 102; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. Ed. 99; *Chicago, B. & Q. Ry. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94.

Interstate carriers may be compelled to establish intrastate commutation fares less than the legally established standard or normal one-way single passenger fares. *Pennsylvania R. Co. v. Towers*, 245 U. S. 6, 62 L. Ed. —, 38 Sup. Ct. 2.

98. *Simpson v. Shepard*, 230 U. S. 352, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18, 57 L. Ed. 1511, 33 Sup. Ct. 729.



rates, the power of the states is exclusive. Within their respective domains, each has full and complete authority, the only limitation on the power of the state is that the rates fixed for intrastate transportation must not deprive the carrier of just compensation for the services rendered,<sup>99</sup> and an intrastate rate must not result in unjust discrimination against an interstate rate arising out of the close and intimate relationship of the two rates.<sup>1</sup>

The limitation upon national power over intrastate rates was recognized by Congress in the passage of the Interstate Commerce Act and its amendments by the proviso to Section 1 which declares that the Interstate Commerce Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory, or to the transmission of messages by telephone, telegraph, or cable wholly within one state and not transmitted to or from a foreign country from or to any state or

99. *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; *Chesapeake & O. R. Co. v. Conley*, 230 U. S. 513, 57 L. Ed. 1597, 33 Sup. Ct. 985; *Knott v. Chicago, B. & Q. R. Co.*, 230 U. S. 474, 57 L. Ed. 1571, 33 Sup. Ct. 975; *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. 192, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. 148; *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. Ed. 292, 23 Sup. Ct. 571; *Smyth v. Ames*, 169 U. S. 466, 42

L. Ed. 819, 18 Sup. Ct. 418; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 38 L. Ed. 1030, 14 Sup. Ct. 1062; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 36 L. Ed. 176, 12 Sup. Ct. 400; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 336, 6 Sup. Ct. 334, 388, 1191.

1. *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833; *Oregon R. & Nav. Co. v. Campbell*, 230 U. S. 525, 57 L. Ed. 1004, 33 Sup. Ct. 1026.

territory. "The question we have now before us," said Mr. Justice Hughes in the *Minnesota Rate cases*<sup>2</sup> "essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusive internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority. Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith. Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 620, 621."

2. 230 U. S. 352, 57 L. Ed. 1511, S. 1151, Ann. Cas. 1916A 18.  
33 Sup. Ct. 729, 48 L. R. A. (N.

§ 24. **Statutes of States Regulating Delivery of Cars for Interstate Shipment Inoperative.** Since the enactment of the Hepburn amendment of 1906 to the Interstate Commerce Act, state laws regulating the furnishing and delivery of cars for interstate shipments, are inoperative.<sup>3</sup> This amendment specifically defines "transportation" under federal control as including cars and other vehicles for interstate movements, and declares it to be the duty of the carrier to furnish such cars upon reasonable request. Obviously, therefore, the subject-matter of furnishing cars for interstate shipments is fully covered by the national statute. Applying this principle, the Supreme Court held that a Minnesota reciprocal demurrage act which required railroads to furnish cars upon request, within seventy-two hours at stations on a line and within forty-eight hours at terminal points, was inapplicable to interstate shipments.<sup>4</sup>

A statute of the state of North Carolina required common carriers to forward freight by routes selected by the shipper under penalty of forfeiting fifty dollars a day to the shipper for each day of refusal to receive such freight and all damages actually sustained. The Supreme Court held that the statute was inoperative as to all interstate shipments for the reason that Congress, by the passage of the Interstate Commerce Act, had taken possession of and had legislated upon the

3. *Illinois Cent. R. Co. v. Louisiana R. R. Commission*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; *St. Louis, I. M. & S. R. Co. v. Edwards*, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 262; *Yazoo & M. V. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1, 57 L. Ed. 389, 33 Sup. Ct. 213; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *Standard Stock Food Co.*

*v. Wright*, 225 U. S. 540, 56 L. Ed. 1197, 32 Sup. Ct. 784; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140.

4. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203.

same subject-matter.<sup>5</sup> An Arkansas statute prescribing

5. *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140. Said the Court: "The particular act which was held to violate the statute was refusing the tender of goods for shipment from Charlotte, North Carolina, to Davis, West Virginia, that is, a tender for interstate shipment, and a demand coincidentally for a bill of lading covering the shipment explicitly stating the origin of the shipment at Charlotte and its destination at Davis. The Supreme Court of the State decided, as we have seen, that the statute deals with a common law duty simply, one which attaches before freight enters into interstate commerce, and hence concluded as follows: 'The statutory enforcement under penalty of the common law duty to accept freight 'whenever tendered' is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce.' We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted. See, in this connection, *Houston & Texas Cent. R. R. Co. v. Mayes*, 201 U. S. 321. In the term 'transportation,' we have seen, Congress has included 'all services in connection with the receipt . . . of property transported.' And this certainly imposes the obligation to receive the property as well as to carry it, one of the obligations the carrier must perform 'upon reasonable request therefor.' Other provisions of the same import and direction might be quoted. Con-

ditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. Their inducement and aim may be to secure a prompter performance of duty by the carrier, and so far beneficial. But that is not the question. The question is, where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the Interstate Commerce Act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a 'through route,' must be established, filed and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See *Robinson v. B. & O. R. R. Co.* (appears in next number). By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What



that a carrier should pay a per diem penalty to a shipper for a failure to notify a consignee of the arrival of a shipment at destination, was held to be invalid as to interstate shipments for the reason that Congress by the enactment of the Hepburn Act had legislated upon the same subject matter, the term "transportation" in the federal act covering all services in connection with the delivery of property transported."

§ 25. **States may Compel Switch Connections with Private Side Tracks for Intrastate Business.** The jurisdiction conferred upon the Interstate Commerce Commission by the Hepburn Act of 1906 as amended in 1910,<sup>7</sup> to compel a switch connection between the line of an interstate railroad and a private siding of a shipper or a lateral branch line of railroad under the conditions therein prescribed, applies exclusively to shippers tendering interstate traffic for transportation. The authority so given the national Commission could not and does not defeat the jurisdiction of a state to compel such switch connections, when the traffic tendered is of an intrastate character. Under the limited power granted by the commerce clause of the Constitution, Congress possesses no authority to legislate or to regulate the transportation and movement of intrastate traffic.

The power of the states to require facilities for the movement of intrastate freight is as broad and as exclusive as the national jurisdiction over interstate facilities. A state commission may, therefore, compel even an interstate carrier to make a switch connection with a private track or an industrial plant when reasonably necessary for the purpose of transporting freight to other points in the same state.<sup>8</sup> In the case cited,

they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties."

6. *St. Louis I. M. & S. Ry. Co. v. Edwards*, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 262. See also *Yazoo & M. V. R. Co. v. Greenwood*

*Grocery Co.*, 227 U. S. 1 57 L. Ed. 389, 33 Sup. Ct. 213.

7. Section 70, *infra*.

8. *Chicago, R. I. & P. Ry. Co. v. State*, — *Okla.* —, 157 Pac. 1039. But carriers cannot be compelled to construct spur tracks to private industries at their own ex-

the court sustained an order of the Corporation Commission, and said: "The evidence justified the Commission in finding that there was sufficient business of an intrastate character to require the construction of such side track by the plaintiff, and the jurisdiction of the Corporation Commission to require switch connections to be made is not affected by the fact that a portion of the business tendered to the railroad company would be of an interstate nature. If such were the case, the state authorities would be without jurisdiction in any matter where interstate commerce might incidentally be affected, and the Commission would be without authority to require the erection of a depot, freight house, or a platform, or to require a switch connection with a private side track or spur, or to require rates and charges for purely intrastate matters. The cases in this court sustaining orders of this character are too numerous to cite. In fact, it is hardly possible to conceive of any order which might be made by the Commission affecting a railroad operating an interstate line of railroad in which interstate commerce would not in some way be affected."<sup>9</sup>

**§ 26. State Statutes Prescribing Rates Specified in Bill of Lading Void as to Interstate but Valid as to Intrastate Shipments.** Before the exercise of federal control over rates and fares for interstate transportation, state laws prescribing that a rate or charge specified

pense. *Missouri Pac. R. Co. v. Nebraska*, 217 U. S. 196, 54 L. Ed. 727, 30 Sup. Ct. 461, 18 Ann. Cas. 989; *Missouri Pac. R. Co. v. State*, 164 U. S. 403, 41 L. Ed. 489, 17 Sup. Ct. 130; *McInnis v. New Orleans & N. E. R. Co.*, 109 Miss. 482, L. R. A. 1915E 682, 68 So. 481; *St. Louis & S. F. R. Co. v. Zalondek*, 28 Okla. 746, 115 Pac. 867; *St. Louis & S. F. R. Co. v. State*, 27 Okla. 424, 112 Pac. 980.

9. See also *Michigan R. R. Commission v. Detroit & M. R. Co.*, 178

*Mich.* 230, 144 N. W. 696; *State v. Chicago, M. & St. P. R. Co.*, 115 Minn. 51, 131 N. W. 859; *Cox v. Pennsylvania R. Co.*, 240 Pa. 27, 87 Atl. 581; *State v. Southern R. Co.*, 153 N. C. 559, 69 S. E. 621; *State ex rel. Chicago, M. & P. S. R. Co. v. Public Service Commission*, 77 Wash. 529, Ann. Cas. 1915D 202, 137 Pac. 1057; *Union Lime Co. v. Railroad Commission of Wisconsin*, 144 Wis. 523, 129 N. W. 605.

in a bill of lading issued by a carrier was binding upon it, were valid and enforceable although the shipment thereunder was interstate in character. But the Interstate Commerce Act, under the provisions of Section 6, makes a rate or charge published and filed with the Commission conclusive upon all parties, and as binding as if fixed by statute. If a difference or a discrepancy exists between the published rate and that specified in the bill of lading, the former controls. As the congressional law, therefore, deals with and regulates the same subject matter, the state law must give way and becomes inoperative as to all shipments under federal control.<sup>10</sup> The efficacy of the state law, however, over all intrastate shipments, is not affected by the substituted rule in interstate commerce transactions.

§ 27. **State Laws and Decisions Governing Liability for Loss and Damage to Property Superseded by Carmack Amendment.** Prior to the passage of the Carmack amendment to the Act to Regulate Commerce making the initial carrier accepting property for shipment liable for any loss and damage thereto on the line of a connecting carrier, liability for loss and damage to property on interstate as well as intrastate shipments was subject to state regulations. Some states permitted an exemption by contract from a part of the carrier's common law liability; others allowed no exception. These differences in the applicable laws created inequalities and a constant diversity of legislation and judicial rulings with respect to interstate transportation.<sup>11</sup> But each state, as it had the right to do, exer-

10. *Gulf, C. & S. F. Ry. Co. v. Hefey*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Yorke Furniture Co. v. Southern R. Co.*, 162 N. C. 138, 78 S. E. 67.

11. The situation prior to the enactment of the Carmack amendment was well described in *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865, as follows:

"Some states allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation or contract; others did not; the Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in

cised the power inherent in its territorial jurisdiction in the absence of a regulation by Congress. In the passage of the Carmack amendment, Congress plainly manifested its intention to exercise its conceded control over the subject matter of all loss and damage to interstate shipments. All state laws and regulations, and the rulings of state courts, were thereby annulled and superseded as to all shipments from one state to another.<sup>12</sup>

another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The Congressional action has made an end to this diversity; for the national law is paramount and supersedes all State laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectual, and not impaired or destroyed, by the State court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them.' That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must is-

sue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. (*Northern Pacific Ry. v. State of Washington*, 222 U. S. 370; *Southern Railway v. Reid*, 222 U. S. 424; *Mondou v. Railroad*, 3 U. S. 1.)"

12. *United States*. New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland, 240 U. S. 34, 60 L. Ed. 511, 36 Sup. Ct. 230, L. R. A. 1917A 193; *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, Ann. Cas. 1916D 333; *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383; *Norfolk &*



§ 28. State Statute Authorizing Issuance of Transportation in Payment for Advertising Invalid. A statute of the state authorizing a domestic corpora-

W. R. Co. v. Dixie Tobacco Co., 228 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609; Missouri K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; Chicago, St. P., M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7; Hudson v. Chicago, St. P., M. & O. Ry. Co., 226 Fed. 38.

**Arkansas.** Kansas City & M. R. Co. v. Oakley, 115 Ark. 20, 170 S. W. 565.

**Florida.** Hall v. Florida East Coast R. Co., 65 Fla. 111, 61 So. 197; Fornel v. Florida East Coast R. Co., 65 Fla. 102, 61 So. 194.

**Georgia.** Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019.

**Illinois.** Gamble-Robinson Commission Co. v. Union Pac. R. Co., 262 Ill. 400, Ann. Cas. 1915B 89, 104 N. E. 666.

**Iowa.** McMillan v. Chicago, R. I. & P. R. Co., 147 Iowa, 596, 124 N. W. 1096.

**Kentucky.** Armstrong v. Illinois Cent. R. Co., 162 Ky. 539, 172 S. W. 947; Adams Exp. Co. v. Cook, 162 Ky. 592, 172 S. W. 1096.

**Minnesota.** Ford v. Chicago, R. I. & P. R. Co., 123 Minn. 87, 143 N. W. 249.

**Mississippi.** Southern R. Co. v. North State Cotton Co., 107 Miss. 71, 64 So. 965; St. Louis & S. F. P. Co. v. Woodruff Mills, 105 Miss. 214, 62 So. 171.

**Missouri.** Donovan v. Wells, Fargo & Co., 265 Mo. 291, 177 S. W. 839; Thomas Bros. v. St. Louis & S. F. R. Co., 188 Mo. App. 22, 173 S. W. 96; Dunlap v. Chicago & A. R. Co., 187 Mo. App. 201, 172 S. W. 1178; Morrison Grain Co. v. Missouri Pac. R. Co., 182 Mo. App. 339, 170 S. W. 404; McElvain v. St. Louis & S. F. R. Co., 176 Mo. App. 379, 158 S. W. 464.

**New Jersey.** Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379.

**New York.** Lynch v. New York Cent. & H. River R. Co., 89 N. Y. Misc. 472, 153 N. Y. Supp. 633.

**North Carolina.** Morphis v. Southern Exp. Co., 167 N. C. 139, 83 S. E. 1; McConnell v. New York Cent. & H. River R. Co., 163 N. C. 504, 79 S. E. 974; Herring v. Atlantic Coast Line R. Co., 160 N. C. 252, 76 S. E. 527; Pace Mule Co. v. Seaboard Air Line R. Co., 160 N. C. 215, 76 S. E. 513.

**Oklahoma.** Ft. Smith & W. R. Co. v. Awbrey & Semple, 39 Okla. 270, 134 Pac. 1117; Missouri, K. & T. R. Co. v. Walston, 37 Okla. 517, 133 Pac. 42.

**South Carolina.** Stukes v. Southern Exp. Co., 96 S. C. 383, 80 S. E. 612.

**Washington.** Coovert v. Spokane, P. & S. R. Co., 80 Wash. 87, 141 Pac. 324.

tion engaged as a common carrier to issue transportation in payment for printing and advertising is invalid as to all interstate transportation for the reason that Congress has assumed jurisdiction of the same subject matter by the enactment of the Interstate Commerce Act and the amendments of 1906. Such a statute is invalid even as to that portion of an interstate journey which is within the bounds of a single state.<sup>13</sup> "No state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress acting within the limits of its constitutional powers. It has long been settled that when an 'act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment.' *Sinnot v. Davenport*, 22 How. 227, 243; *M., K. & T. Railway v. Haber*, 169 U. S. 613, 686; *Reid v. Colorado*, 187 U. S. 137. This results, Chief Justice Marshall said in *Gibbons v. Ogden*, 9 Wheat. 1, as well from the nature of the Government as from the words of the Constitution."<sup>14</sup>

**§ 29. States May Require Operation of Trains Between Intrastate Points on Interstate Lines—Limitations and Exceptions.** Neither the commerce clause nor legislation by Congress thereunder precludes a state from requiring interstate carriers to afford adequate passenger train service between points within its boundaries.<sup>15</sup> For railroads, from the public nature of the business carried on by them, and the interest which the public has in their operation, are subject, as to

13. *New York C. & H. River R. Co. v. Gray*, 239 U. S. 583, 60 L. Ed. 451, 36 Sup. Ct. 176; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

14. *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272.

15. *Missouri Pac. R. Co. v. State ex rel. Taylor*, 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1,

their state business, to state regulation, which may be exercised either directly by legislative authority or by administrative bodies endowed with the power to that end.<sup>16</sup> But this power of regulation, if it were exercised by a state in such an arbitrary or unreasonable manner as to take the property of the carrier without compensation, is void under the Fourteenth Amendment.<sup>17</sup> Applying the foregoing principles, an order of a state commission requiring an interstate carrier to operate a passenger train over a branch line from a point within the state to the state line, was not so arbitrary and unreasonable, under the facts, as to be invalid under the Fourteenth Amendment, nor was it an undue burden upon interstate commerce even though there were no station facilities at the state line.<sup>18</sup> And likewise an order of a public service commission requiring a carrier to operate two passenger trains daily each way on a line theretofore used for freight traffic, only, is valid;<sup>19</sup> but an order of the Mississippi Railroad Commission requiring the operation of certain passenger trains each way daily on the line of an inter-

51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398; *Hennington v. State*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086; *Delaware, L. & W. R. Co. v. Van Santwood*, 216 Fed. 252.

16. *Chesapeake & O. R. Co. v. Public Service Commission of West Virginia*, 242 U. S. 603, 61 L. Ed. 520, 37 Sup. Ct. 234; *Chicago, M. & St. P. R. Co. v. State*, 238 U. S. 491, 59 L. Ed. 1423, 35 Sup. Ct. 869, L. R. A. 1916A 1133; *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 237 U. S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560; *Northern Pac. R. Co. v. State ex rel. McCue*, 236 U. S. 585, 59 L. Ed. 735, 35 Sup. Ct. 429; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S.

510, 56 L. Ed. 863, 32 Sup. Ct. 535; *Cleveland, C., C. & St. L. Ry. Co. v. People*, 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. 722; *Lake Shore & M. S. Ry. Co. v. State ex rel. Lawrence*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465.

17. *Mississippi R. R. Commission v. Mobile & O. R. Co.*, 244 U. S. 388, 61 L. Ed. 1216, 37 Sup. Ct. 602; *Missouri Pac. R. Co. v. Tucker*, 230 U. S. 340, 57 L. Ed. 1507, 33 Sup. Ct. 961; *Missouri Pac. R. Co. v. State*, 217 U. S. 196, 54 L. Ed. 727, 30 Sup. Ct. 461, 18 Ann. Cas. 989.

18. *Missouri Pac. R. Co. v. State ex rel. Taylor*, 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. 330.

19. *Chesapeake & O. R. Co. v. Public Service Commission of West Virginia*, 242 U. S. 603, 61 L. Ed. 520, 37 Sup. Ct. 234.

state carrier between two points in Mississippi was, under the facts, held to deprive the carrier of its property without compensation in violation of the Fourteenth Amendment.<sup>20</sup>

It is the primal duty of a carrier to furnish adequate facilities to the public and that duty may be compelled, although, by doing so, some pecuniary loss from rendering such service may result, and an order requiring a carrier to restore a connection at a siding with the train of another carrier which involved the operation of another train at a loss, was held to be valid and not in conflict with the Fourteenth amendment.<sup>21</sup> In so far as the Fourteenth amendment is involved, the powers of the state over carriers in this connection were well summarized by the Supreme Court in the following language:<sup>22</sup> "A state may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation. *Mississippi R. R. Commission vs. Illinois Central R. R. Co.*, 203 U. S. 335; *Prentiss vs. Atlantic Coast Line R. R. Co.*, 211 U. S. 210; *Louisville & Nashville R. R. Company vs. Garrett*, 231 U. S. 298. Under this power of regulation a state may require carriers to provide reasonable and adequate facilities to serve not only the local necessities, but the local convenience of the communities to which they are directly tributary. *Lake Shore, etc., R. R. Co. vs. Ohio*, 173 U. S. 514; *Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission*, 206 U. S. 1; *Mo. Pac. Ry. Co. vs. Kansas*, 216 U. S. 262; *Chicago, etc., R. R. Co. vs. Railroad Commission of Wisconsin*, 237 U. S. 220; and such regulation may extend in a proper case to requiring the run-

20. *Mississippi R. R. Commission v. Mobile & O. R. Co.*, 244 U. S. 388, 61 L. Ed. 1216, 37 Sup. Ct. 602.

21. *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. Ed.

933, 27 Sup. Ct. 585, 11 Ann. Cas. 398.

22. *Mississippi R. R. Commission v. Mobile & O. R. Co.*, 244 U. S. 388; 61 L. Ed. 1216, 37 Sup. Ct. 602.



ning of trains in addition to those provided by the carrier, even where this may involve some pecuniary loss, *Atlantic Coast Line R. R. vs. North Carolina Corporation Commission*, *supra*; and *Mo. Pac. Ry. Co. vs. Kansas*, 216 U. S. 262. But, while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guaranties of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it cannot be taken from its owners without just compensation or without due process of law. *Wisconsin etc., R. R. Co. vs. Jacobson*, 179 U. S. 287; *Atlantic Coast Line R. R. Co. vs. North Carolina corporation Commission*, 206 U. S. 1; *North Pacific R. R. Co. vs. North Dakota*, 236 U. S. 585; *Chicago, etc., R. R. Co. vs. Wisconsin*, 238 U. S. 491. This power of regulation if it is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service passes beyond lawful bounds, is in effect a taking of private property without compensation, and is void, because repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. *Atlantic Coast Line R. R. Co. vs. North Carolina Corporation Commission*, 206 U. S. 1; *Missouri Pac. Ry. Co. vs. Nebraska*, 217 U. S. 196; *Missouri, etc., R. R. Co. vs. Tucker*, 230 U. S. 340; *North-eastern Pacific R. R. Co. vs. North Dakota*, 236 U. S. 585. Whether a statute enacted by the legislature of a state or an order passed by a railroad commission exceeds the bounds which the law thus sets to such authority is a question of law arising on the facts of each case (*Mississippi Railroad Commission vs. Illinois Central R. R. Co.*, *supra*), and the appropriate remedy for determining that question is a bill in equity such as was filed in this case to enjoin its enforcement."

§ 30. **State and Municipal Regulations Prescribing Speed, Signals and Stoppage of Interstate Trains.** The power to regulate the speed or signals of interstate trains, and to require passenger trains carrying interstate travelers to stop at stations, belongs to those subject matters of interstate commerce which may be controlled by the states in the absence of legislation by Congress.<sup>23</sup> But the states, even without national regulation, cannot subject interstate transportation to unreasonable regulations.<sup>24</sup> Until Congress occupies the field, municipal corporations may regulate the speed of interstate trains within their limits, and ordinances passed for that purpose are not invalid as interfering with interstate commerce unless they constitute an un-

23. Section 11, *supra*; *Lasater v. St. Louis, I. M. & S. R. Co.*, 177 Mo. App. 534, 160 S. W. 818.

A state law and an order of a state commission thereunder requiring four passenger trains each way, if so many are run daily, to stop at all county seat stations, is not an undue burden upon interstate commerce. *Gulf, C. & S. F. R. Co. v. State*, 246 U. S. 58, 62 L. Ed. —, 38 Sup. Ct. 236.

24. *Southern Ry. Co. v. King*, 217 U. S. 524, 54 L. Ed. 868, 30 Sup. Ct. 594; *Lusk v. Town of Dora*, 224 Fed. 650. In *Southern Ry. Co. v. King*, *supra*, the Court said: "Applying the general rule to be deduced from these cases to such regulations as are under consideration here, it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce. It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the

State to regulate, the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb. On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact."

reasonable burden upon interstate commerce.<sup>25</sup> A state statute requiring railroads to convey livestock at such a rate of speed that the time consumed from the initial to the delivering point shall not exceed one hour for each eighteen miles traveled, is valid.<sup>26</sup>

The power of a state to require interstate trains to stop at stations to discharge and receive passengers is, subject to the limitations (a) that the law or regulation must not be an unreasonable burden upon interstate commerce and (b) that the passenger service otherwise afforded is not reasonably adequate in the light of all the surrounding facts and circumstances.<sup>27</sup> The adjudications of the national Supreme Court furnish many illustrations of the application of these principles to concrete cases.<sup>28</sup> A statute of the state of Wisconsin

25. *Erb v. Morasch*, 177 U. S. 584, 44 L. Ed. 897, 20 Sup. Ct. 819; *Lusk v. Town of Dora*, 224 Fed. 650.

An order of a state railroad commission requiring passenger trains within the state to start from their point of origin and from stations on the line in accordance with advertised schedule, with an allowance of not exceeding thirty minutes at junction points to make connections with other trains, was invalid under the commerce clause, being an undue burden upon interstate commerce. *Missouri, K. & T. R. Co. v. State*, 245 U. S. 484, 62, 1 L. Ed. —, 38 Sup. Ct. 212.

26. *Chicago, B. & Q. R. Co. v. Kyle*, 228 U. S. 85, 57 L. Ed. 741, 33 Sup. Ct. 440; *Chicago, B. & Q. R. Co. v. Cram*, 228 U. S. 70, 57 L. Ed. 734, 33 Sup. Ct. 437.

27. *Missouri, K. & T. Ry. Co. v. Town of Witcher*, 25 Okla. 586, 106 Pac. 852; *Gulf, C. & S. F. Ry. Co. v. State*, — Tex. Civ. App. —, 169 S. W. 385; *State ex rel.*

*Great Northern R. v. Railroad Commission of Washington*, 60 Wash. 218, 110 Pac. 1075.

28. *Gulf C. & S. F. R. Co. v. State*, 246 U. S. 58, 62 L. Ed. —, 38 Sup. Ct. 236; *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 237 U. S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U. S. 135, 54 L. Ed. 970, 30 Sup. Ct. 633; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. Ed. 230, 28 Sup. Ct. 121; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 51 L. Ed. 933, 27 Sup. Ct. 585, 11 Ann. Cas. 398; *Mississippi R. R. Commission v. Illinois Cent. R. Co.*, 203 U. S. 335, 51 L. Ed. 209, 27 Sup. Ct. 90; *Lake Shore & M. S. Ry. Co. v. State ex rel. Lawrence*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465; *Gladson v. State*, 166 U. S. 427, 41 L. Ed. 1064, 17 Sup. Ct. 627; *Illinois Cent. R. Co. v. State*, 163 U. S. 142, 41 L. Ed. 107, 16 Sup. Ct. 1096.

prescribed that every railroad corporation running four or more passenger trains through a village daily should stop at least two of them to receive and discharge passengers. In deciding that this statute was invalid as being an unlawful burden upon interstate commerce, the court said:<sup>29</sup> "The statute includes, necessarily, the Supreme Court held, interstate passenger trains and clearly excludes accommodation freight trains; and, so viewing it, the Supreme Court pronounced it a proper exercise of the power of the State. In reviewing the decision we may start with certain principles as established: (1) It is competent for a State to require adequate local facilities, even to the stoppage of interstate trains or the re-arrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the Federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement.\* \* \* These, then, are the factors, and we do not put out of view the difficulties which infest the case, but, considering them all and the deference due to state legislation, we are constrained to hold the Wisconsin statute invalid."

§ 31. Georgia "Blow-Post" Law Invalid, Being a Direct Burden upon Interstate Commerce. Applying the principles stated in the foregoing paragraph, a law of the state of Georgia requiring every locomotive engineer to blow the whistle and to check and keep

29. *Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin*, 237 U. S. 220, 59 L. Ed. 926, 35 Sup. Ct. 560.



checking the speed of his train four hundred yards from each grade crossing so as to stop the train in time to prevent injury should any person or thing be crossing the track, was held to be invalid for the reason that it was an unreasonable regulation of or burden upon interstate commerce and, therefore, in violation of the commerce clause.<sup>30</sup> "The Company," said the court, "set out the applicable sections of the law and alleged that its train was running in interstate commerce between the states, and especially between Georgia and South Carolina. That between the city of Atlanta, Georgia, and the Savannah river, a distance of 123 miles, where the same is the boundary line of Georgia, there are 124 points where the line of the railroad crosses public roads of the different counties of the state, established pursuant to law, and that all of such crossings are at grades. That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time required for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings; among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater,—for an average freight train, not less than five minutes. That the train alleged to have caused the death of the deceased was composed of an engine, a mail car, and two coaches, and that if the Blow-Post Law had been complied with on the day in question at least three minutes would have been consumed at each crossing,—more than six hours between Atlanta and the Savannah river. That the running time between those points according to the adopted schedule was four hours and thirty minutes. That if the law had been complied with the time consumed

30. Seaboard Air Line Ry. Co. Ed. 1160, 37 Sup. Ct. 640. L. R. v. Blackwell, 244 U. S. 310, 61 L. A. 1917F 1184.

between those points would have been more than ten and one-half hours. That for freight trains the time consumed would be more than sixteen hours, the maximum speed of such trains on the company's road being 20 miles an hour. That the crossings are the usual and ordinary grade crossings and there are no conditions which make any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade. That between the city of Atlanta and the Savannah river the line of the company's railroad crosses the tracks of two other railroads, and that under the laws of the state a train is required to come to a full stop 50 feet from the crossing, and that the time so consumed would increase the time required to operate between the points referred to. \* \* \* The facts so specified, and which it was decided would give illegal operation to the statute, are alleged in the present case, and assuming them to be true,—and we must so assume,—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful.”

**§ 32. States May Compel Carriers to Make and Maintain Track Connections for Interchange of Traffic.** Railroads constitute public highways of a most important character, and the states have, therefore, the power to regulate in a reasonable and proper manner, the conduct and business of railroad corporations in so far as they relate to intrastate traffic.<sup>31</sup> This power is, however, subject to the Fourteenth Amendment to the Constitution of the United States which prohibits the taking of property without due process of law;<sup>32</sup>

31. *Great Northern R. Co. v. United States v. Joint-Traffic Ass'n*, State ex rel. State Railroad & 171 U. S. 505, 43 L. Ed. 259, 19 Warehouse Commission, 238 U. S. Sup. Ct. 25; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 340, 59 L. Ed. 1337, 35 Sup. Ct. 753; *Wadley Southern R. Co. v. State*, 235 U. S. 651, 59 L. Ed. 405, 35 Sup. Ct. 214; *Lake Shore & M. S. Ry. Co. v. State*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465;

32. *Florida East Coast R. Co. v. United States*, 234 U. S. 167, 58 L. Ed. 1267, 34 Sup. Ct. 867; *Grand*

but in so far as the commerce clause of the Constitution is concerned and the authority delegated to the Interstate Commerce Commission by Congress under that clause, the states still have the power to require railroad companies to make track connections where the established facts show public necessity therefor, just regard being given to advantages which will probably result to one side and necessary expenses to be incurred on the other.<sup>33</sup>

Congress has not taken over the whole subject of terminals, switches and sidings so that all powers of the state relating thereto are void.<sup>34</sup> Even when considered with respect to interstate traffic as well as intrastate traffic, an order of an administrative body of the state requiring a track connection between two carriers is not void.<sup>35</sup> But in any event, such connections may be compelled for the benefit of intrastate traffic.<sup>36</sup> In the *Jacobson* case, the court said: "Plaintiff in error urges that transporting cattle from Minnesota to Iowa constitutes interstate commerce, and that neither the State of Minnesota nor its railroad commission has the right to in any manner interfere with or regulate such commerce. The judgment in this case, however, neither regulates nor interferes with that commerce, nor does that part of the statute upon which

*Trunk R. Co. of Canada v. Michigan R. R. Commission*, 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 510, 56 L. Ed. 863, 32 Sup. Ct. 185; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 853, 32 Sup. Ct. 535; *Central Stock Yards Co. v. Louisville & N. R. Co.*, 192 U. S. 508, 48 L. Ed. 565, 24 Sup. Ct. 339; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900.

33. *Jacobson v. Wisconsin, M. & P. R. Co.*, 71 Minn. 519, 40 L. R.

A. 389, 70 Ann. St. Rep. 358, 74 N. W. 893, affirmed in 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

34. *Grand Trunk R. Co. of Canada v. Michigan R. R. Commission*, 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152.

35. *Seaboard Air Line Ry. Co. v. Railroad Commission of Georgia*, 240 U. S. 324, 60 L. Ed. 669, 36 Sup. Ct. 260; *Wadley S. R. Co. v. State*, 235 U. S. 651, 59 L. Ed. 405, 35 Sup. Ct. 214.

36. *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. 115.

the judgment is founded. Whether any other portion of the statute does regulate such commerce is beside the question, and it is not necessary to here decide. To provide at the place of intersection of these two railroads, at Hanley Falls, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of property and cars to and from their respective lines, as provided for by this judgment, would plainly afford facilities to interstate commerce, if there were any, and would in nowise regulate such commerce within the meaning of the Constitution. That is all that has been done by the judgment under review. A State may furnish such facilities or direct them to be furnished by persons or corporations within its limits without violating the Federal Constitution. But the Supreme Court of the State, in the opinion delivered therein, said that there was ample evidence in the case of a necessity for such track connection resulting from the benefit which would accrue to exclusively state commerce when considered alone, to justify the ordering of the connection in question."

§ 33. **Validity of State Laws Providing for "Full Crews" on Interstate Trains.** Under the grant of power to it by the commerce clause, Congress may take entire charge of the equipment and management of interstate trains, but it has not done so in respect to the number of employes to whom may be committed the actual management of cars or trains containing interstate traffic. Until, therefore, Congress establishes regulations on that subject, the states may enact such laws covering the subject matter that are reasonable



and not an undue burden upon interstate commerce.<sup>37</sup> A state law requiring three brakemen on every freight train consisting of more than twenty-five cars is, therefore, valid even as to trains containing interstate traffic.<sup>38</sup> Similarly a subsequent statute of the same state, providing that no railroad company owning yards or terminals in cities where cars were switched across public crossings, should operate or switch cars with less than six employes, was sustained by the national Supreme Court as a proper exercise of the police power

37. *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. 92; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289; *New York, N. H. & H. R. Co. v. People*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418; *Western U. Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934; *Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819.

38. *Chicago, R. I. & P. R. Co. v. State*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275, in which the court said: "It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits. Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety

as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power granted to the General Government or with some right secured by that instrument or unless they are purely arbitrary in their nature. The statute here involved is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce and for the protection of those engaged in such commerce. Under the evidence, there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power and not germane to the objects which evidently the state legislature had in view."

of the state and not an interference or burden upon interstate commerce.<sup>39</sup>

§ 34. **State Regulations or Charges for Transportation by Water.** The judicial power of the courts of the United States extends to all cases of admiralty and maritime transportation.<sup>40</sup> Under this clause of the Constitution, the jurisdiction of the federal government extends to transportation over navigable waters of the United States and upon the high seas even between two points or places in the same state.<sup>41</sup> "Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same state, when no part of the voyage is upon the high seas, for every navigator knows that in many such cases nearly the whole voyage is out of the limits of a state."<sup>42</sup> The Interstate Commerce Act does not apply to carriers by water unless operating under a common control, management or arrangement for a continuous shipment with a carrier by rail.<sup>43</sup>

In the absence of legislation by Congress upon the same subject matter, a state may regulate the charges of water carriers for transportation of passengers and property even over the high seas between two ports in the same state when the water carrier operates independently of a carrier by rail;<sup>44</sup> for the subject mat-

39. *St. Louis, I. M. & S. Ry. Co. v. State*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443.

40. Section 2, Article 3 of the Constitution.

41. *The Belfast*, 7 Wall. (U. S.) 624, 19 L. Ed. 266.

42. *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 18 L. R. A. 221, 28 Am. St. Rep. 142, 29 Pac. 873.

43. Section 92, *infra*.

44. *Wilmington Transp. Co. v. Railroad Commission of California*, 236 U. S. 151, 59 L. Ed. 508, 35 Sup. 276. By the act of Con-

gress creating the United States Shipping Board, approved Sept. 7, 1916, 39 Stat. at L. 728, Congress seems to have exercised its control over the charges of water carriers for transportation over the high seas between two ports in the same state; for a common carrier by water in interstate commerce is therein defined as a common carrier engaged in the transportation by water of passengers or property on the high seas or the great lakes or on regular routes from port to port between one state, terri-

ter is of a local nature admitting of diversity of treatment according to local necessities of each state until Congress exercises its control by legislation. A state may also regulate the rates for ferriage from its shore to the shore of another state when the ferry is being operated without any common arrangement with a rail carrier.<sup>45</sup> "Considering the conditions of interstate railroad transportation," said the court in the last case cited, "which might extend not only from one State to another but through a series of States, or across the Continent, and the consequences which would ensue if each State should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that 'this species of regulation' was one 'which must be, if established at all, of a general and national character' and could not be 'safely and wisely remitted to local rules.' But, in the case of ferries, we have a subject of a different character. We dismiss from consideration those ferries which are operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and continuous transportation. Ferries, such as are involved in the present case are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power. There are a multitude of such ferries throughout the country and, apart from certain rules as to navigation, they have not engaged the attention of Congress.

tory, district, or possession of the United States and any other state, territory, district, or possession of the United States, or between places in the same territory, district or possession. Section 18 of the act provides that every common carrier by water in interstate

commerce shall establish, observe and enforce just and reasonable rates, fares, charges, etc.

45. *Port Richmond & B. P. Ferry Co. v. Board Chosen Freeholders County of Hudson*, 234 U. S. 317, 58 L. Ed. 1330, 34 Sup. Ct. 821.

We also put on one side the question of prohibitory or discriminatory requirements, or burdensome exactions imposed by the State, which may be said to interfere with the guaranteed freedom of interstate intercourse or with constitutional rights of property. The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question, we can entertain no doubt. It is true that in the case of a given ferry between two States there might be a difference in the charge for ferriage from one side as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a ferry which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local requiring regulation according to local conditions. It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstances, it would be necessary for Congress to act directly or to establish for that purpose a Federal agency.



The matter is illuminated by the consideration of this alternative for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the States are obvious and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will of course control."

**§ 35. Statutory Enactments of States requiring Facilities and Appliances on Interstate Trains.** The grant to Congress of the power to regulate commerce with foreign nations and among the several states, did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people even though interstate commerce was incidentally affected thereby.<sup>46</sup> Applying these principles, a statute of the state of New York forbidding steam railroads to heat passenger cars with a stove or furnace kept inside of the car, was held to be a proper exercise

46. *Crossman v. Lurman*, 192 U. S. 189, 48 L. Ed. 401 24 Sup. Ct. 234; *Austin v. State*, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. 132; *Baltimore & O. S. W. Ry. Co. v. Voigt*, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. 385; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289; *Western U. Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934; *Louisville & N. R. Co. v. State*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714; *Plumley v. Com.*, 155 U. S. 461, 39 L. Ed. 223, 15 Sup. Ct. 154; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28;

*Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 30 L. Ed. 976, 7 Sup. Ct. 907; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487, 7 Sup. Ct. 313; *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. Ed. 237, 6 Sup. Ct. 1114; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 30 L. Ed. 158, 5 Sup. Ct. 826; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Sherlock v. Alling* 93 U. S. 99, 23 L. Ed. 819; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. (U. S.) 560, 21 L. Ed. 710.

of the police power of the state and valid as to both intrastate and interstate trains in the absence of national legislation dealing with the same subject matter.<sup>47</sup>

A Georgia statute requiring headlights of a certain character on all engines of trains within the states, was declared valid as to engines used in interstate commerce for the reason that Congress had not, at that time, passed any law covering the same field.<sup>48</sup> A statute of the state of Indiana prescribing that railroad cars should be equipped with certain grab irons and hand-holds, was invalid as to all cars on interstate railroads because Congress, by the enactment of the Federal Safety Appliance Act and the amendments thereto, had assumed control over the same subject, and the state law was therefore inoperative.<sup>49</sup> A state law making it unlawful to run any freight train on Sunday was declared to be valid even as to interstate trains on the ground that, although in a limited degree affecting interstate commerce, it was an ordinary police regulation of the state designed to secure the well-being, and to promote the general welfare of the people.<sup>50</sup>

**§ 36. Power of States over Interstate Employers and Employes in Absence of Federal Legislation.** The constitutional grant to Congress to regulate interstate and foreign commerce is divisible into two classes, first, those subject matters of commerce which are of such a nature that, if regulated, they must be regulated by one uniform rule throughout the country, and second, those subject matters which are of such a nature that they do not require uniformity of regulation and may, therefore, be controlled by the states according to their respective local needs. The power of Congress over the first class is exclusive and the state may not

47. *New York, N. H. & H. R. Co. v. People*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. 418.

48. *Atlantic Coast Line R. Co. v. State*, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829. But see Chapter LIII, *infra*.

49. *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304.

50. *Hennington v. State*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086.

legislate concerning it. Those subjects which fall under the second class may be regulated by state laws in the absence of congressional action.<sup>51</sup>

The relationship of master and servant while engaged in interstate commerce, falls within the second class.<sup>52</sup> Hence, the states, in the absence of legislation by Congress covering the same subject matter, have full power to determine the liability of employers to their employes although engaged in interstate commerce.<sup>53</sup> For example, a state law regulating the hours of employment on railroads and including within its scope interstate employes, was valid prior to the enactment of the federal Hours of Service Act.<sup>54</sup> A state law requiring every locomotive engineer to secure a license was held to be valid although some of them were employed in interstate commerce because Congress had not legislated upon the same subject matter.<sup>55</sup> The statute of a state requiring all railway locomotive engineers within the state to be examined as to their capacity to distinguish and discriminate between colors, including those engaged in interstate commerce, was a valid exercise of the police powers of the state in the absence of legislation by Congress covering the same field.<sup>56</sup> But a statute of the state of Texas declaring it to be a misdemeanor for a person to serve as a conductor on a freight train without having had two years'

51. Section 12, *supra*.

52. *Texas & P. R. Co. v. Riggsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Northern Pac. R. Co. v. State ex rel. Atkinson*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160.

53. *St. Louis, I. M. & S. R. Co. v. State*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D

138; *Missouri Pac. R. Co. v. Castle*, 224 U. S. 541, 56 L. Ed. 875, 32 Sup. Ct. 606; *Chicago, R. I. & P. R. Co. v. State*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275.

54. *Northern Pac. R. Co. v. State ex rel. Atkinson*, 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160; *State v. Missouri Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500.

55. *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564.

56. *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28.

previous experience as a brakeman, was declared to be invalid because in violation of the Fourteenth Amendment to the federal Constitution.<sup>57</sup> However, the power of the state under the commerce clause in that case was not involved. An enactment of the legislature of the state of Arkansas providing for "full crews" on trains, including those used in moving interstate traffic, was held not to be a violation of the commerce clause as Congress had not acted upon the same subject matter.<sup>58</sup>

**§ 37. Interstate Messages by Telegraph Prior to Amendment of 1910 to Act to Regulate Commerce.** Before the amendment of 1910 to the Interstate Commerce Act including telegraph, telephone and cable companies, many state statutes governing the duties of telegraph companies as to interstate messages, were held to be valid.<sup>59</sup> In a leading case, the *Western U. Tel. Co. v. James*,<sup>60</sup> a Georgia act, imposing a penalty for a failure to exercise due diligence in the delivery of a telegram, was held not to be an interference with interstate commerce even as to messages sent from points without the state to points within the state of Georgia, for the reason that no attempt was made to enforce the provision of the statute beyond the limits of the state. Likewise a state statute requiring prompt delivery of messages and permitting a recovery for all damages due to negligence in transmission or delivery, was held to be valid as to messages sent from a point in that state

57. *Smith v. State*, 233 U. S. 630, 58 L. Ed. 1129, 34 Sup. Ct. 681, L. R. A. 1915D 677, Ann. Cas. 1915D 420.

58. *Chicago, R. I. & P. R. Co. v. State*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. 275. The same conclusion was reached in the later case of *St. Louis, I. M. & S. R. Co. v. State*, 240 U. S. 518, 60 L. Ed. 776, 36 Sup. Ct. 443.

59. *Western U. Tel. Co. v. Bates*, 93 Ga. 352, 20 S. E. 639;

*Western U. Tel. Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Postal Tel. Cable Co. v. Umstadter*, 103 Va. 742, 2 Ann. Cas., 511, 50 S. E. 259; *Western U. Tel. Co. v. Powell*, 94 Va. 268, 26 S. E. 828; *Western U. Tel. Co. v. Bright*, 96 Va. 778, 20 S. E. 146; *Western U. Tel. Co. v. Tyler*, 90 Va. 297, 44 Am. St. Rep. 910, 18 S. E. 280.

60. 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934.



to points in another state.<sup>61</sup> In a later case, the national Supreme Court held that a statute of the state of Virginia exacting a penalty for the failure to deliver a message, was valid as to a telegram sent from a city in that state to New York, where it appeared that the negligence in transmission occurred in Virginia;<sup>62</sup> but the court indicated that such a statute was valid as to interstate messages only in the absence of legislation by Congress.

On the other hand the national Supreme Court held that a statute of Indiana requiring the transmission and delivery of messages was invalid as to a delivery in Iowa of a message sent from the state of Indiana.<sup>63</sup> Again, a statute of South Carolina permitting damages for mental anguish arising from the failure of a telegraph company to deliver a message, was declared to be invalid under the commerce clause as to a telegram sent from a city in South Carolina to Washington, D. C., the act being plainly, it was held, an attempt to regulate interstate commerce.<sup>64</sup> A message sent from a point in Virginia to a person on board a government vessel lying in the Norfolk Navy Yard, and which was not delivered on account of negligence of the telegraph company, did not create a penal act within the provisions of the statute of Virginia, as the state law, it was held, could have no extra-territorial force, the Norfolk Navy Yard being under the exclusive control of Congress.<sup>65</sup> It is difficult to see the reason for the distinctions made in some of these cases, but in all of them the court expressly or impliedly recognized the rule that state laws as to interstate messages would be invalid if Congress should legislate concerning

61. *Western U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815.

62. *Western U. Tel. Co. v. Crovo*, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399.

63. *Western U. Tel. Co. v. Pen-*

*dleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126.

64. *Western U. Tel. Co. v. Brown*, 234 U. S. 542, 58 L. Ed. 1457, 34 Sup. Ct. 955, 5 N. C. C. A. 1024.

65. *Western U. Tel. Co. v. Chiles*, 214 U. S. 274, 53 L. Ed. 994, 29 Sup. Ct. 613.

the same subject matter. In the enactment of the amendment including these companies as carriers under the Interstate Commerce Act, Congress exercised its potential power over them and such statutes of the state are now, so far as interstate messages are concerned, invalid.<sup>66</sup> In the Virginia cases, cited, it was held that by the passage of the Interstate Commerce Act as amended in 1910, Congress had occupied the field of liability of telegraph companies as to interstate messages so that state statutes providing penalties for failure to transport messages with diligence were applicable only to intrastate business.

§ 33. **State Laws Regulating Interstate and Foreign Messages of Telegraph, Telephone, and Cable Companies, Invalid.** Since the inclusion by the amendment of 1910 to the Interstate Commerce Act of telegraph, telephone and cable companies, whether wire or wireless, engaged in sending messages from one state to another and to foreign countries, all state laws regulating the receipt and delivery of interstate and foreign telegrams and telephone messages are void, for the reason that Congress has occupied the entire field and has taken complete control of the regulation of such companies as to all messages and telegrams capable of being included under national control. The power of the states to legislate with reference to the same subject matter, has been suspended.<sup>67</sup> A state law, therefore, prescribing that any provision in a con-

66. *Western U. Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946; *Western U. Tel. Co. v. First National Bank of Berryville*, 116 Va. 1009, 33 S. E. 424; *Western U. Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91; *Norfolk Truckers' Exch. v. Norfolk Southern R. Co.*, 116 Va. 466, 82 S. E. 92. Contra: *Bailey v. Western U. Tel. Co.*, — Tex. Civ. App. —, 171 S. W. 829.

67. *Western U. Tel. Co. v. Holder*, 117 Ark. 210, 174 S. W. 552; *Western U. Tel. Co. v. Simpson*, 117 Ark. 156, 174 S. W. 232; *Western U. Tel. Co. v. Johnston*, 115 Ark. 564, 171 S. W. 859; *Western U. Tel. Co. v. Compton*, 114, Ark. 193, 169 S. W. 946; *Western U. Tel. Co. v. First National Bank of Berryville*, 116 Va. 1009, 33 S. E. 424; *Western U. Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91.

tract stipulating for notice or demand other than such as may be provided by law as a condition precedent to establish any claim or demand, shall be void, does not control as to an interstate telegram which was sent pursuant to a contract with a telegraph company providing, among other things, that the company shall not be liable for damages in any case when the claim was not presented in writing within sixty days after the message was filed with the company. Whether such a regulation as to interstate messages is void or valid is a question solely for the Interstate Commerce Commission to determine.<sup>68</sup>

68. *Gardner v. Western U. Tel. Co.*, 145 C. C. A. 399; 231 Fed. 405. Judge Carland, in this case, said: "We have examined the cases cited by plaintiff and find them to be cases which arose prior to the amendment of the Interstate Commerce Law of June 18, 1910, or they are cases in which state legislation only indirectly burdened interstate commerce. Since the amendment above referred to we find no conflict in the authorities in cases where the facts are similar to the one at bar. Congress has taken possession of the field of interstate commerce by telegraph and it results that the power of the states to legislate with reference thereto has been suspended. The great necessity that commerce between the states should be free from such interference applies in a marked degree to interstate commerce by telegraph. If the regulation which is pleaded in bar in this suit should be held valid in Kansas, and void in Oklahoma, and the illustration may be extended to all the states of the Union, then the power of the United States to regulate commerce between

the states in relation to telegraphic business would not only be directly interfered with, but destroyed. We think that the stipulation in the record that Mr. Lingafelt if present would testify to the facts therein stated shows that the Company has done all that can be required of it in regard to the filing of its schedule of rates, regulations, and practices. We are therefore of the opinion that Congress having taken possession of the field of interstate commerce by telegraph, the provision of the Constitution of Oklahoma relied upon has become inoperative for the purpose of striking down the regulation in question. Whether the regulation is a reasonable one or not is in our judgment a question for the Interstate Commerce Commission to determine. *Mitchell Coal & Coke Co. v. Pa. R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; *Chicago & Alton Ry. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075."

§ 39. **States May Not Regulate "Ticker Service" of Interstate Telegraph Companies.** As the regulations and control of telegraph messages from one state to another, has been placed under the jurisdiction of the Interstate Commerce Commission, the sending of market quotations from a city in one state to a city in another, constitutes interstate commerce within its control. Furthermore, the distribution by a telegraph company, after receiving messages from another state containing such quotations, by what is known as the "ticker service" to their patrons in the same city, it has been held, constitutes interstate commerce, and is not, therefore, subject to regulation by the states.<sup>69</sup> "It is enough that in our opinion," said Mr. Justice Holmes, for the court, in the case last cited, "the transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices and that interference with it was of a kind not permitted to the States. The supposed analogy that has prevailed is that of a receiver of a package breaking bulk and selling at will in retail trade. But it appears to us misleading. We also think it unimportant that the contracts between the Exchange and the Telegraph Companies emphasize the element of *quasi*-sale for a lump sum and leave it to the interest of the Telegraph Companies to find subscribers. Neither that nor the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the Exchange. It does not matter if they have no contract with the Exchange, directly. It does not matter that if the Telegraph Companies did not deliver to any given one the Exchange could not complain. If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from Exchange to broker's office it does not matter what are

69. *Western U. Tel. Co. v. Foster*, 38 Sup. St. 438, decided May 20, 1918.  
ter, — U. S. —, 62 L. Ed. —, 1918.



the stages or how little they are secured by covenant or bond. Thus lumber purchased in Texas for the purpose of filling foreign orders was held to be carried in interstate commerce, although no contract prevented the purchaser from giving it a different destination. *Texas & New Orleans R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111, 126, 33 Sup. Ct. 229, 57 L. Ed. 442. Practice, intent and the typical course, not title or niceties of form, were recognized as determining the character, and other cases to the same effect were cited. The principle was reaffirmed in *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215; and is too well settled to need to be further sustained. *Western Oil Refining Co. v. Lipscomb*, 224 U. S. 346, 349, 37 Sup. Ct. 623, 61 L. Ed. 1181. See *Swift & Co. v. United States*, 196 U. S. 375, 398, 399, 25 Sup. Ct. 276, 49 L. Ed. 518. It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued such until it reached 'the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co. v. Louisiana R. R. Commission*, 236 U. S. 157, 163, 35 Sup. Ct. 275, 59 L. Ed. 517. If the transmission of the quotations is interstate commerce the order in question cannot be sustained. It is not like the requirement of some incidental convenience that can be afforded without seriously impeding the interstate work. It is an attempt to affect in its very vitals the character of a business generally withdrawn from state control—to change the *criteria* by which customers are to be determined and so to change the business. It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U. S. 324, 357, 33 Sup. Ct. 90, 57 L. Ed. 243, and a constitutional power

cannot be used by way of condition to attain an unconstitutional result. *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 35 Sup. Ct. 57, 59 L. Ed. 193. The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. It cannot be justified under that somewhat ambiguous term of police powers. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 359, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Savage v. Jones*, 225 U. S. 501, 520, 32 Sup. Ct. 715, 56 L. Ed. 1182; *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 547, 34 Sup. Ct. 955, 58 L. Ed. 1457. Without going into further reasons we are of opinion that the decree of the Supreme Judicial Court must be reversed."

§ 40. **State and Municipal Regulations of the Interstate Business of Express Companies.** Neither the states nor municipalities have the power to require that a license be obtained as a condition precedent to carrying on interstate commerce for the exercise of the reserve police power of the states to the extent of imposing a direct burden upon that commerce, is invalid.<sup>70</sup> Besides Congress has exercised its authority and has provided its own scheme of regulation over express companies doing interstate business by the enactment of the Hepburn Amendment to the Interstate Commerce Act.<sup>71</sup> Under this amendment, express companies are under the exclusive control of Congress and the Interstate Commerce Commission as to all their interstate shipments. A municipal ordinance, therefore, requiring a license of all express companies, a bond for each vehicle license conditioned for the safe and prompt delivery of all express packages and requiring all vehic-

70. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, 11 Sup. Ct. 851.

71. *Barrett v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203.

les of such carriers to be marked with official numbers, was held to be invalid as applied to the interstate business of express companies and the wagons and drivers employed by them in such commerce.<sup>72</sup> For the same reason a state statute compelling express companies to deliver interstate packages at the residences and places of business was held to be void.<sup>73</sup>

§ 41. **Valid Municipal Regulations of Drivers on Streets Carrying Interstate Traffic.** Municipal corporations may adopt and enforce regulations to insure careful driving over city streets; but when provisions of this nature affect the movement of interstate traffic, as for instance, the drivers of express wagons containing interstate shipments, they must be reasonable and must not arbitrarily restrict facilities of interstate commerce.<sup>74</sup>

72. *Barrett v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203.

73. *State ex rel. v. Adams Exp. Co.*, 171 Ind. 138, 19 L. R. A. (N. S.) 93, 85 N. E. 337, 966. See

also *In re Express Rates, Practices, Accounts and Revenues*, 24 I. C. C. 380.

74. *Barrett v. City of New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203.

## CHAPTER III.

### FEDERAL AND STATE CONTROL OF CARRIERS DURING TIMES OF WAR.

- Sec. 42. Powers of Congress over Carriers during times of Peace and War Distinguished.
- Sec. 43. President Empowered to Assume Control of Transportation Systems in Time of War.
- Sec. 44. Proclamation Assuming Control of Railroads Under Foregoing Provisions.
- Sec. 45. National Statute Providing for Federal Control and Compensation of Carriers During the Period of War with Germany.
- Sec. 46. Purpose of Congress in Enacting the Act Providing for Federal Control During War.
- Sec. 47. Effect of National Statute Providing for Federal Control upon other Laws, Federal and State.
- Sec. 48. President Authorized to Initiate Rates and Charges for Transportation During Period of Federal Control.
- Sec. 49. Actions at Law or Suits in Equity may be Brought by and Against Carriers under Federal Control.
- Sec. 50. Penalty for Violations of the Provisions of the Federal Control Act.
- Sec. 51. When Federal Control of Transportation System Under the Statute shall Terminate.

§ 42. **Powers of Congress over Carriers During Times of Peace and War Distinguished.** During times of peace, the federal government possesses no control over carriers operating within the boundaries of the several states except such as is granted to Congress under the commerce clause. The national legislative body has, therefore, no power to regulate or control carriers engaged exclusively in intrastate commerce or the intrastate business of interstate carriers.<sup>1</sup> The federal government cannot take over, regulate or control carriers engaged solely in moving intrastate commerce during times of peace without an amendment to the national Constitution. But in times of war, no such limitations upon the powers of Congress exist; for the Constitution provides that Congress may de-

1. Chapter 2.



clare war and enact all laws which shall be necessary and proper to carry on the war. The power to declare war carries with it as an incident thereto and inseparable therefrom the right to prosecute the war by all the means known to and recognized by civilized nations.<sup>2</sup> If, therefore, the control or regulation of carriers, whether intrastate or interstate, is necessary or proper for carrying on a war, the federal government, through Congress, may own, operate or regulate them without regard to the limitations of the commerce clause.

**§ 43. President Empowered to Assume Control of Transportation Systems in Time of War.** By an act of Congress approved August 29, 1916, the President was empowered in time of war, through the Secretary of War, to take possession, and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with emergency as may be needful or desirable.<sup>3</sup>

**§ 44. Proclamation Assuming Control of Railroads under Foregoing Provision.** Pursuant to the power given the President by the Act of August 29,

2. *Norwich & W. R. Co. v. Johnson*, 15 Wall. (U. S.) 195, 21 L. Ed. 178; *Dooley v. Smith*, 13 Wall. (U. S.) 604, 20 L. Ed. 547; *Legal Tender Cases*, 15 Wall. (U. S.) 457, 20 L. Ed. 287; *Tyler v. Defrees*, 11 Wall. (U. S.) 331, 20 L. Ed. 161; *Miller v. United States*, 11 Wall. (U. S.) 268, 20 L. Ed. 135; *United States v. Alexander*, 2 Wall. (U. S.) 404, 17 L. Ed. 915; *Prize Cases*, 2 Black (U. S.) 635, 17 L. Ed. 459.

3. In *Muir v. Louisville & N. R. Co.*, 247 Fed. 888, the court held that by the passage of this act Congress intended for the War Department and no other to take

over the railroads for war purposes and that no authority was granted therein for the railroads to be operated by a director general of railroads or by the Secretary of the Treasury. The effect of this decision, even if correct when decided (March 2, 1918) was destroyed by the Federal Control Act approved March 21, 1918; for section 8 of the latter provides that the President may execute any of the powers therein and theretofore granted him with relation to federal control through such agencies as he may determine. See sec. 45 and appendix D, *infra*.

1916, President Wilson, on December 28, 1917, took possession of and assumed control of all railroad systems of transportation within the boundaries of the United States. The proclamation is as follows: "Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives bearing date April 6, 1917, resolved: 'That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.' And by joint resolution bearing date of December 7, 1917, resolved: 'That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.' And whereas it is provided by section 1 of the act approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,' as follows: 'The President in time of war is empowered, through the Secretary of the War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops,

war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable.' And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war: Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers. It is hereby directed that the possession, control, operation, and utilization of such transportation systems.

hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies. Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any order, general or special, hereafter made by said director shall have paramount authority and be obeyed as such. Nothing herein shall be construed as now affecting the possession, operation, and control of street electric passenger railways, including railways commonly called interurbans, whether such railways be or be not owned or controlled by such railroad companies or systems. By subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or operation may be taken of all or any part of such street railway systems, including subways and tunnels; and by subsequent order and proclamation possession, control, and operation in whole or in part may also be relinquished to the owners thereof of any part of the railroad systems or rail and water systems, possession and control of which are hereby assumed. The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements



for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful. But nothing herein contained, expressed, or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed. Regular dividends hitherto declared and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations. Except with the prior written assent of said director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine. From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on Decem-

ber 31, 1917. In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed. Done by the President, through Newton D. Baker, Secretary of War, in the District of Columbia, this 26th day of December, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-second."

§ 45. **National Statute Providing for Federal Control and Compensation of Carriers During the Period of War with Germany.** Following the President's proclamation by which he took possession of and assumed control of all systems of transportation within the boundaries of the United States, Congress enacted a statute known as the Federal Control Act which was approved by the President on March 21, 1918.<sup>4</sup> The leading object in the enactment of this statute was to provide the means and method of compensating the carriers for the use of their property during the period of federal control which, by the provisions of the Act, is limited to and during the period of the war and for a reasonable time thereafter, not to exceed one year and nine months following the date of the ratification of the Treaty of Peace.

The first section of the statute provides that the President, having in time of war taken over the possession, use, control and operation of certain railroads and systems of transportation, is authorized to agree with and to guarantee to every carrier making operating returns to the Interstate Commerce Commission, that during the period of federal control, it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, not exceeding a sum equivalent as nearly as may be to its average

4. For full copy of Act providing for federal control of carriers during period of the war, see appendix D, *infra*. For copies

of orders of Director General under Federal Control Act, see Appendix Q, *infra*.

annual railway operating income for the three years ending June 30th, 1917. The first section also contains further provisions authorizing the President to insert certain stipulations in the agreements with the carriers. Section 2 prescribes that if no agreement is made with the carrier, the President may nevertheless compensate any carrier while under federal control. Under the provisions of section 3 all claims for just compensation not adjusted as provided in section 1 shall, on the application of the President or of any carrier, be submitted to a board consisting of three referees to be appointed by the Interstate Commerce Commission with a proviso for an appeal to the Court of Claims. Section 5 prohibits any carrier while under federal control from declaring or paying any dividend in excess of its regular rate of dividends during the three years ending June 30th, 1917, without the prior approval of the President.

Under the provisions of section 6 the sum of \$500,000,000 is appropriated for the use of the President as a revolving fund for the purpose of paying the expenses of federal control. For the purpose of providing funds requisite for maturing obligations or for legal and proper expenditures, or for reorganizing railroads in receivership, section 7 provides that the carriers may during the period of federal control issue such bonds, notes, equipment trust certificates, stock, and other forms of securities as the President may first approve. Section 8 provides that the President may execute any of the powers granted him with relation to federal control through such agencies as he may determine and may fix the reasonable compensation for the performance of services in connection therewith.

**§ 46. Purpose of Congress in Enacting the Act Providing for Federal Control During War.** The purpose of Congress in enacting the act providing for federal control of transportation systems during the war with Germany was thus stated by the Senate

Committee on Interstate Commerce in its report submitting the bill:<sup>5</sup> "The Committee on Interstate Commerce, to whom was referred the bill (S. 3752) to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes, have considered the same and report thereon with the recommendation that the bill do pass without amendment. On August 29, 1916, Congress enacted the following: 'The President in time of war is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation or any part thereof, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable.' Under this statute and by virtue of all other power enabling him, the President, on December 28, 1917, took possession and control of the railroad systems of continental United States and the owned or controlled systems of coastwise or inland water transportation. He appointed Hon. William G. McAdoo Director General of Railroads. Since December 28 he has been operating those systems of transportation for war and national purposes. There was no provision in the act of August 29, 1916, for determining the just compensation due as a constitutional right to the owners of the properties thus taken over for public purposes. It therefore became necessary to provide the proper legislation to meet the two very important needs; first, the proper judicial machinery for determining the amount of just compensation thus accruing; secondly, to give to the President the authority to offer the owners of the property thus taken just and reasonable terms for compensation which, if accepted, will determine finally and completely all rights as between the Government

5. Report 246, Part 1, 65th Congress, 2d Session.



and the owners, thus avoiding the delays incident to litigation and giving strength and stability to the security market and rendering assistance to our future war financing. The President, in his proclamation, instructed the Director General to enter upon negotiations with the several companies looking to an agreement for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net railway operating income thereof for the three-year period ending June 30, 1917. Your committee were of opinion that this is the time for war emergency legislation and not the time to settle the many controversial and vexed questions concerning our future transportation policy. With these preliminary observations your committee submits a brief explanation of the various sections of the bill: Section 1 authorizes the President to agree with the carriers whose property has been taken over that during the period of Federal control each carrier may receive as just compensation—in lieu of all rights arising under due process of law—an annual sum not exceeding its average annual railway operating income for the three years ended June 30, 1917, plus a return at a rate to be fixed by the President upon the cost of additional facilities made during the last six months of 1917, the amount of such net earnings and the cost of such additional facilities to be determined by the Interstate Commerce Commission and certified to the President. This is in substance the President's suggestion. The certification of the commission is to be taken as conclusive for the purpose of such agreement. Any operating income in excess of such standard return is to be paid into the Treasury of the United States and placed in the revolving fund provided by section 6 of this act. About 75 great operating railroads do over 90 per cent of the railroad business. It is believed by your committee that most of these great railroad carriers will

accept these terms as a just and fair measure of their constitutional rights. Section 1 further provides that ordinary taxes, National and State, shall, as now, be paid out of operating revenue; but war taxes accruing under the act of October 3, 1917, are to be paid by the companies out of their own funds, or charged against the standard return. In other words, the holders of railroad securities are by section 1 (like holders of other securities) to bear their own just portion of the war burden. Section 1 also requires that each agreement the maintenance and depreciation of the property and shall contain adequate and appropriate provisions for the creation of any reserves or reserve funds found necessary in connection therewith; so that the properties may at the end of Federal control be returned to the owners in a condition substantially equivalent to their condition when taken over by the Government; and that proper adjustments both in the standard return and in the terms of final settlement may be made. Thus even-handed justice will be worked out as between each company and the Federal Government. If the right of all the railroads making returns to the Interstate Commerce Commission are fixed under the provisions of this section, the Government will guarantee approximately \$945,000,000 a year. Since the preparation of this summary, however, the committee has amended section 1 by inserting a provision authorizing a return, at such reasonable rate as the President may determine, upon the cost of additional transportation facilities made during the last six months of 1917. This addition, of perhaps ten to fifteen millions, is made in the interest of equality, it appearing that two hundred to two hundred and fifty millions of additional capital has, during the last half of 1917 been put into transportation facilities by a comparatively few of the carriers taken under Federal control. There has, of course, been much discussion as to the fairness and justice of the proposed amount of the standard return. It should not be overlooked that the gist of the question is, What would these companies be likely to receive from the courts

as just compensation? The amount of just compensation is not a legislative question—it is a judicial question. (*Monongahela Navigation Co. v. U. S.*, 148 U. S., 312). It follows, in the opinion of your committee, that much of the evidence and discussion concerning the so-called surplus is irrelevant. It is plainly in the public interest—and indeed a war need—that the President be authorized to offer to settle with the owners of these properties on a basis approximately equivalent to that which sound-thinking men would advise the owners they would be likely to receive by court decision. The rights of such owners must be tested by present conditions—not by some theory of capitalization never made operative under Federal or State law or generally followed by the courts. Questions of value are always difficult questions. It is highly probable, if not certain, if the whole question were remitted to the courts, they would take as the basis for determining just compensation, the actual net earnings for a reasonable period. During the last three years new investment in properties now under Federal control has been at the rate of approximately three hundred and seventy-five millions a year. The year ended June 30, 1915, was one of the poorest in recent railroad history. The other two years have been prosperous years. The average of the three years therefore reflects neither poverty nor riches. The purchasing power of the dollar accruing to the stockholder, as well as to the wage earner, has decreased. Dividends in industrial companies have largely increased. The rate of return upon Government bonds, both abroad and in the United States, has largely increased. The percentage of return upon the value of the railroad property taken under Federal control can not be accurately stated; for until the Federal valuation, now in process, is completed, no one knows the value of that property. The book value may be taken for certain comparative purposes, as of some significance; it must not be regarded as accurate. The proposed standard return, figured upon the book value of all the companies will give a return not far from 5.32 per cent. Compar-

ing this return to that which accrues to the purchaser of Government bonds, it seems large; but Government bonds run for a period of 25 to 30 years. The proposed guarantee to the owners of railroad securities may run for only a few months. The Government is practically a tenant at will. After the most careful consideration your committee are of the opinion that the owners of these properties would not be unlikely to to receive an award from a court at least equal to the proposed offer; that it is therefore the duty of Congress to authorize the President to make such offers as will prevent patriotic and fair-minded American citizens from resorting to litigation, in time of war, in order to determine their rights against their Government. The standard return thus provided for will, if accepted by the various operating companies, be disposed of substantially as hitherto; that is, for the payment of their fixed charges (and war taxes which remain a burden upon the standard return), for dividends, and if any balance remains, for so-called surplus. The fixed charges ordinarily fall into interest on bonds and other debt obligations, and leased line rentals, generally in the form of interest and dividends on outstanding bonds and stock or leased companies. These rentals are not, as is sometimes thought, properly a part of operating expenses. They are really disbursements for the use of capital; for it makes no practical difference whether the operating company is consolidated with the leased companies and pays interest and dividends upon its own bonds and stock issued in payment for the subsidiary companies, property, or whether it pays interest and dividends upon the stock and bonds of the leased companies. In either event the disbursement is a disbursement on capital account and not on operating account. The foregoing makes it clear that the railroads accepting the suggested terms will be fully able to make all their usual disbursements to their security holders. In effect, this regular income is guaranteed by the Government to the security holders during the period of Federal Control. The stabilizing, confidence-producing effect



of such guaranty will, as your committee believe, be of great assistance in future war financing. The terms above indicated will probably be found just and fairly applicable to the security holders of most of the railroads of the country. But there are certain undeveloped and reorganizing roads whose operating income for three years will not fairly test their right to just compensation. Some special provision to meet the just demands of these companies seems requisite. Section 1, accordingly, provides in the last paragraph thereof that, when the President finds that the condition of nondividend paying carriers is because of nonoperation, receivership, or other undeveloped or abnormal condition such as to make the basis of earnings provided for the other carriers "plainly inequitable," as a fair measure of just compensation, then the President may make with such carrier such agreement as under the circumstances of the particular case he shall find just. Section 2 provides in case the agreement provided for in section 1 is not made, the President is authorized to pay not exceeding 90 per cent. of the estimated amount of just compensation. This, in the opinion of your committee, would tend to stabilize conditions for the security holders of the newer struggling companies, whose rights may not be easy of speedy ascertainment. Section 2 does not require the President to make any payment at all to such owners, thereby avoiding the danger of offering a premium to unreasonable and greedy litigants. Section 3 provides easily available facilities safeguarding the constitutional rights of owners to have their just compensation determined by due process of law. It also furnishes another opportunity for settlement of cases which may not be satisfactorily disposed of by agreements in accordance with the standard return, or under the special power of section 1. Section 3 provides that the Interstate Commerce Commission shall, on the application of the President, or of any carrier, appoint boards of referees, the commission and its forces being made not ineligible as such referees. These referees are armed with the usual pow-

ers of judicial tribunals—to summon witnesses, require the production of books, etc., and may hold hearings in Washington and elsewhere, as convenience may serve. They may consolidate and classify cases. These boards are to give full hearings, consider all pertinent facts, and report their findings to the President in a form convenient and available for the making of such agreements as are authorized by section 1. The President and such company may then make an agreement for compensation not in excess of that reported by the referees. Failing such agreement, either the United States or the company may file a petition in the Court of Claims; and in the proceedings in this court such report is *prima facie* evidence of the amount of just compensation and of any facts reported. It is the confident opinion of your committee that section 3 not only effectually guards the constitutional rights of all owners but that the proceedings before the referees will be found so complete and satisfactory that few, if any, cases will ever reach the Court of Claims. Section 4 provides that the agreed or ascertained just compensation may be increased during Federal control by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of additions made while the Government is in possession. Manifestly an increase in the property used requires a corresponding increase in the compensation for the use. No increase is allowed for additions paid for out of surplus during the period of Federal control. Whether a denial of any return upon surplus earnings invested in additional facilities will result in throwing an unnecessary burden of financing upon the Federal Government and in the accumulation of a dead surplus will require careful consideration by the Senate. The main purpose of section 5 is to give stability to our financial conditions. From the standard return the railroad companies may without permission pay their regular dividends. Conceivably it may be desirable that some of the prosperous carriers should be permitted somewhat to increase their regular dividends; if so, the President's prior ap-

proval must be obtained. Nondividend payers or irregular dividend payers, whose standard or ascertained return warrants dividends, may with the President's permission be put in the dividend-paying class at such rate as the President may determine. This section goes upon the theory that during the war the railroad-security holders ought to receive certain, regular and moderate dividends; but that extra, unexpected dividends—a common source of speculation and manipulation—should not be permitted. Section 6 is a very important section. It provides for a revolving fund to be made up from an initial appropriation of \$500,000,000, together with any excess earnings of any of the carriers. This fund is to be available to the President for the purpose of paying the expenses of the Federal control, supplying any deficit in the just compensation accruing to any carrier, and to provide for rolling stock and terminals, to be used and accounted for as the President may direct, and to be disposed of as Congress may hereafter by law provide. This contemplates that engines, cars, and perhaps terminals, will be purchased or constructed by and will belong to the United States. This rolling stock will be used wherever war and national needs demand—precisely as the Pullman and other private car lines are now used on the lines of the various carriers as the needs of industry or the demands of the seasons require. The ultimate disposition of this rolling stock must await post-war legislation. This section contemplates that such rolling stock, although owned by the United States, will be used on the lines of the various railroads and the use charged for upon the books of the companies, so that at the expiration of Federal control the book-keeping of each railroad company will reflect, as hitherto, the traffic which has moved over each road and the cost of operation. The section further provides that the President may, on or in connection with the property of any carrier, make or order any company to make additions desirable either for war purposes or in the public interest. Doubtless it will be necessary



in connection with Army camps and shipboards to make substantial extensions of railroad and other carrier property. Your committee believes that such additions and extensions should become and remain the property of the separate carriers; that there should be no confusion of title as to real estate, tracks, and other fixed property between any railroad company and the United States. As it is possible that some such additional facilities thus made to the property of various carriers will in times of peace be found worth less than the cost thereof, this section provides that claims for loss or damage accruing from such compelled investment shall be settled either by agreement between the carrier and the President, or, failing such agreement, shall be ascertained by due process of law, as provided in section 3. As some of the companies may not have the requisite funds to pay for such extensions and additions, the President is authorized from the revolving fund to advance all or any part of such cost, these advances to bear interest at rates and to be payable on such terms as the President may determine, so that the United States may ultimately be fully reimbursed for such advances. Section 6 also provides that the President may, from the revolving fund expend such sums as he deems necessary or desirable for the utilization or operation of canals and for the purchase, construction, utilization, and operation of boats and other water carriages on the inland and coastwise waterways. It is believed by your committee that much relief may be afforded the rail carriers by a further development of the watercarriers and of facilities on these natural water highways. Section 7 provides for financing the maturities of carriers during the period of Federal control. It authorizes the President to purchase for the United States, at prices not exceeding par, any securities issued by the railroads, roads approved by him as consistent with the public interest. Such securities may be sold without loss to the Treasury whenever the President deems it desirable, the proceeds of such sale to go back into the revolving fund. The estimates



of the maturities for the next four years are as follows:

1918 .....	\$182,606,528
1919 .....	188,213,052
1920 .....	186,526,253
1921 .....	440,905,528

Section 8 provides in general terms that the President may execute his powers with relation to the Federal control through such agencies as he may determine and fix the reasonable compensation for services rendered in connection therewith, using the personnel and facilities of the Interstate Commerce Commission and all other governmental bodies. Section 9 is simply to the effect that nothing contained in this act shall be deemed to restrict the powers heretofore given to the President to take possession and assume control of any and all systems of transportation. It also provides that this act shall apply to any carriers to which Federal control may be hereafter extended. Section 10 provides that so far as not inconsistent with Federal control, each of the carriers shall remain subject to all laws and liabilities whether arising under statutes or at common law. It also provides that the President may, whenever in his opinion the public interest so requires, initiate rates by filing the same with the Interstate Commerce Commission, such rates to be fair, reasonable, and just, and that upon complaint the rates thus initiated by him may be reviewed by the Interstate Commerce Commission. In such review the Interstate Commerce Commission may consider all the facts and circumstances existing at the time of the making of the rate. After full hearing, the commission may make such findings and orders as are authorized by the act to regulate commerce as amended. Your committee were of opinion that the commercial organizations of the country should be disturbed as little as the emergency would allow, and that every safeguard would be thrown around the great productive activities of the country, everything possible to inspire confidence in their being protected from unnecessary embarrassment. Section 11 provides penalties for violation of this act

or orders of the President made thereunder. Section 12 has been inserted at the request of the Department of Justice and is intended to provide for continuing the life and *status quo* of cases pending under the anti-trust and interstate commerce acts. It requires no comment. Section 13 provides that the Federal control shall continue not to exceed 18 months after the declaration of peace. It is possible that certain conditions may arise from Federal control which will need adjustment before the properties are returned to their owners, and a reasonable period should intervene in which these conditions may be met and adjusted. It may be that the nation will be unwilling to return to the conditions obtaining before the assumption of Federal control. Legislation may be demanded radically changing the relation of the Government to the railroads from that now existing in the interstate commerce act as amended. These problems will require time for careful and deliberate consideration. Therefore your committee has suggested a period of 18 months, and they believe it will be found adequate for that purpose. In section 13 there is also a provision to the effect that the President may, prior to July 1 next, relinquish control of such transportation system as he may deem not needful or desirable, and may, thereafter, on agreement, relinquish all or any part of any system of transportation. Your committee also recommends that at any time after July 1, 1918, the President may agree with the owners of all or any part of any system of transportation when in the opinion of the President further Federal control of the same is unnecessary, to relinquish such control to the owners. The section also contains a general provision that the president may relinquish all railroads at any time when he shall deem such action needful or desirable. Your committee have adhered to the set purpose to limit this legislation to war emergency purposes, and to avoid all contentions and controversial questions. We believe that the bill will accomplish these results. It follows closely the President's recommendations. It has in its main provisions and purpose

received general approval and comparatively little criticism."

§ 47. **Effect of National Statute Providing for Federal Control Upon Other Laws, Federal and State.** It is prescribed in Section 10 of the Act providing for federal control of carriers during the period of the war, that the carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of the Federal Control Act or any other Act applicable to such federal control, or with any order of the President.

The phrase "or with any order of the President" seems to imply that the President may, by order, set aside other laws, federal or state, affecting carriers under federal control.<sup>6</sup> For example, the Director General

6. Such seems to have been the view of Senator Townsend, one of the members of the conference committee on the Act while pending in the Senate. In discussing the provisions of section 10 in the Senate, he said: "The words, 'or with any order of the President' were imputed into the bill and they had no object known to the committee. They were not necessary for the purposes of the paragraph. It is clear to anyone who will read the bill that the original provision was intended simply to fix the status of claimants against the railroads after they were taken over by the Federal Government. It was thought that perhaps a new situation would arise by such taking over, and that, therefore, the same laws and procedure which had obtained prior to Federal control relative to claims and suits should be specifically mentioned as applying to

conditions afterwards. No lawyer would have difficulty in discovering what the paragraph meant. But it was thought by the Director General, or by some one outside of the committee, that it was wise to insert the words, 'or with any order of the President,' meaning by that that State and Federal laws could be set aside by the President's order, and that not necessarily for war purposes. There could be no possible reason for inserting this language so far as the effective control of the railroads is concerned. That specific power has not been granted the President up to the present time and yet the Director General has been operating the roads for three months and no complaint of lack of power has been mentioned. The author of this provision probably had in mind what purpose it might serve, but it will not be one necessary to the operation of the roads



of railroads, pursuant to this and other provisions of the Federal Control Act, issued two general orders<sup>7</sup> directing that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time the cause of action accrued, or in the county or district where the cause of action arose. Section 10 also provides that actions at law or suits in equity may be brought by and against carriers and judgments rendered as provided by the law when the Federal Control Act became effective.

**§ 48. President Authorized to Initiate Rates and Charges for Transportation During Period of Federal Control.** Section 10 of the Act provides that during the period of federal control, whenever, in his opinion, the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which rates, fares, charges, classifications, regulations and practices shall not be suspended by the Commission pending final determination.

The statute further provides that such rates, fares, charges, classifications, regulations and practices shall

for war purposes. Until the Senator from Arkansas (Mr. Robinson) so forcefully and effectually discussed this provision in the Senate, I had not known that anyone believed that with it left out the President would be unable to operate the railroads successfully. I am confident the Senator is mistaken, for I repeat that they have been operated without difficulty for three months without this law, and if it were never enacted no embarrassment would result to Government control. I still insist that these objectionable words have no legitimate place in this paragraph. The House of Representatives left them out. \* \* \* I do not know exactly what the

original proponents of the provision had in mind; but knowing, as I do know, what has come from legislation heretofore enacted by Congress—namely, the food and fuel control bill—I thought it was very unwise to incorporate arbitrary power in this measure unless there was some definite reason for doing so and some war emergency was to be served. This matter was debated on the floor of the Senate; but my contention was not agreed to by the Senate, and so I had to adhere to the action of the Senate in the conference committee; but all I had to do was to remain silent.”

7. General Orders No. 18 and 18a Appendix Q, *infra*.



be reasonable and just and shall take effect at such time and upon such notice as he may direct; but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices, or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition. After a full hearing the Commission may make such findings and orders as are authorized by the Act to Regulate Commerce as amended, and said findings and orders shall be enforced as provided in said Act.

A proviso to Section 10 prescribes that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation or practice, shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

§ 49. **Actions at Law or Suits in Equity may be Brought by and Against Carriers Under Federal Control.** The Federal Control Act declares that actions at law or suits in equity may be brought by and against carriers subject thereto, and that judgments may be rendered as now provided by law. In any action at

law or suit in equity against the carrier, no defense shall be made thereto upon the grounds that the carrier is an instrumentality or agency of the federal government; nor shall any such carrier be entitled to have transferred to a federal court any action instituted by or against it, which action was not so transferable prior to the federal control of such carriers. Any action which has been so transferred because of such federal control or of any Act of Congress or official order or proclamation relating thereto, shall upon motion of either party be retransferred to the court in which it was originally instituted. No process, mesne or final, shall be levied against any property under such federal control. The foregoing provisions constitute a part of Section 10 of the Act.

In construing the foregoing provisions, the Court of Appeals of Kentucky said:<sup>s</sup> "Obviously, the effect of the foregoing provisions of the statute is to entirely suspend the right of issuing and levying executions, attachments, or other like process against the property of common carriers under federal control, during the continuance of such control; but it does not prevent a litigant from bringing his action against the latter in any court of competent jurisdiction, or such court from granting him such relief in the form of a judgment or otherwise, short of the coercive payment or satisfaction of such judgment by the levy of an execution or other like process upon or against any property of the carrier, as the litigant might, but for the passage of the act, under the laws of the state of his residence, have been entitled to. In other words, he may, notwithstanding the act, bring his action and obtain judgment against the carrier; but he cannot enforce against the latter the satisfaction of the judgment, when obtained, by execution or similar process. The object of the act of Congress and of the President's proclamation referred to is to prevent, except as allowed by the director general of the railroad under the control of the government,

s. Louisville & N. R. Co. v. Steel, — Ky. —, 202 S. W. 878.

the seizure or sale of its property, which, if allowed, would interfere with the government's use of such property as required in its efforts to bring the war to a successful issue. It is true, as argued by counsel for appellant, that in construing section 764, Civil Code Practice, which provides that, upon the affirmance of a judgment for the payment of money which has been superseded, 10 per cent. damages on the amount superseded shall be awarded against the appellant, this court has held that damages on the affirmance of a judgment superseded will not be given except where the judgment is one that might be enforced by execution or similar process. *Worsham v. Lancaster*, 104 Ky. 813, 48 S. W. 410, 20 Ky. Law Rep. 969; *Bell's Trustee v. City of Lexington*, 124 Ky. 463, 99 S. W. 344, 30 Ky. Law. Rep. 609. But this fact will not confer upon this court the right to withhold the 10 per cent. damages because enforcement of the judgment therefore by execution or similar process against the property of the carrier is suspended by the act of Congress. The right of the appellee, upon the affirmance of the judgment appealed from to the 10 per cent. damages, is no more prohibited by the act of Congress than was his right to recover the judgment in the court below. While section 12 of the act declares that moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States, it also provides for its disbursement in the same manner as indicated by the Interstate Commerce Commission's classification of accounts in force December 27, 1917. The fact, however, that whatever appellee receives from appellant upon his judgment may be paid, according to such classification of accounts, out of moneys derived by the federal government from the operation of appellant's railroad, cannot militate against his right to have his demand against appellant ascertained and determined by the judgment of a court of competent jurisdiction. In this case his claim for the damages sued for has been fixed by the judgment rendered in the lower court and affirmed by this court; and as his right to the 10 per cent. damages claimed upon

the amount of the judgment superseded legally results from its affirmance, he is clearly entitled to have judgment therefor, although its satisfaction, by reason of the prohibitive provisions of the act of Congress, cannot, be now enforced by execution or other coercive process against the property of the carrier. In addition to what has been said, there is yet another reason for granting the relief now asked by appellee. There is nothing in any provision of the act of Congress which in any way interferes with his right to proceed against the surety in the supersedeas bond for the amount of his judgment recovered against appellant in the lower court or the 10 per cent. damages thereon awarded by this court, and, as by the terms of that bond the surety is also liable for the 10 per cent. damages resulting from the affirmance of the judgment in this court, the awarding of such damages by this court will be and is necessary in order to fix and determine the liability of such surety therefor."

**§ 50. Penalty for Violations of the Provisions of the Federal Control Act.** Section 11 of the Federal Control Act provides that every person or corporation whether carrier or shipper, or any receiver, trustee, lessee, agent, or person acting for or employed by a carrier or shipper, or other person, who shall knowingly violate or fail to observe any of the provisions of the Act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of the Act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than \$5,000, or, if a person, by imprisonment for not more than two years, or both.

Each independent transaction constituting a violation of, or a failure to observe, any of the provisions of the Act, or any order entered in pursuance there-

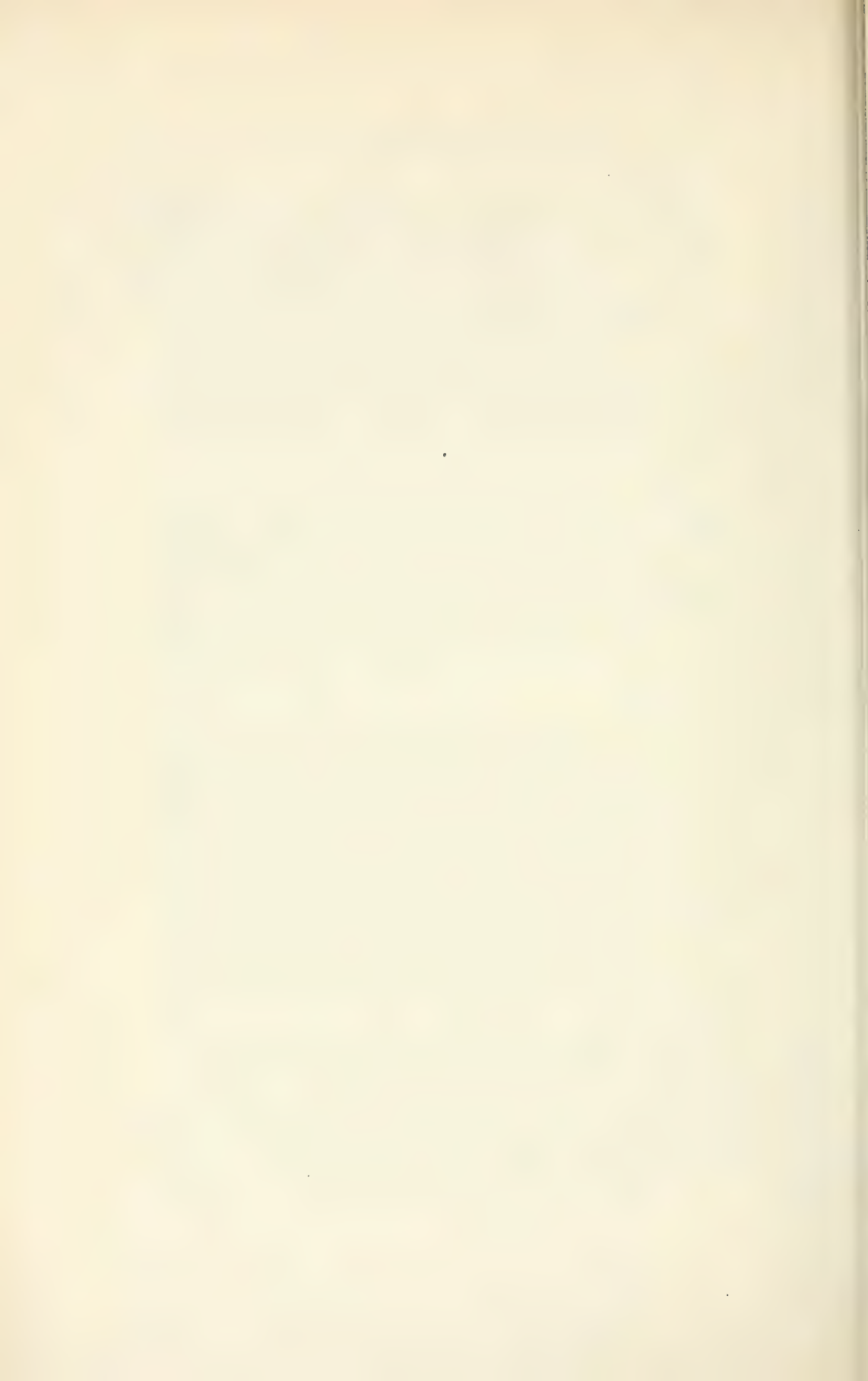


of, will constitute a separate offense. For the taking or conversion to its own use or the embezzlement of money or property derived from or used in connection with the possession, use or operation of any railroad system, the criminal statutes of the United States, as well as the criminal statutes of the various states where applicable, shall apply to all officers, agents, and employees engaged in said railroad and transportation service, while the same is under federal control, to the same extent as to persons employed in the regular service of the United States. .

**§ 51. When Federal Control of Transportation Systems Under the Statute Shall Terminate.** Section 16 of the Act declares that its provisions are emergency legislation enacted to meet conditions growing out of the war, and nothing therein is to be construed as expressing or prejudicing the future policy of the federal government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

It is further provided in Section 14 of the Act that the federal control of railroads and transportation systems therein provided, shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the Treaty of Peace. But the President may, prior to July 1st, 1918, relinquish control of all or any part of any railroad or system of transportation, further federal control of which the President shall deem not needful or desirable.

The President may at any time during the period of federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation, and he may relinquish all railroads and systems of transportation under federal control at any time he shall deem such action needful or desirable.



## PART TWO

---

### DUTIES AND LIABILITIES OF COMMON CARRIERS TO SHIPPERS UNDER ALL FEDERAL INTERSTATE LAWS

---

THE ACT TO REGULATE COMMERCE AND  
SUPPLEMENTARY LEGISLATION.

CARMACK AND CUMMINS AMENDMENTS.

FEDERAL BILL OF LADING LAW.





## CHAPTER IV

### THE ACT TO REGULATE COMMERCE AS ORIGINALLY ENACTED—ITS GENESIS, PURPOSE, GENERAL SCOPE AND VALIDITY.

- Sec. 52. Brief Historical Review of Federal Control over Carriers and Scope Thereof.
- Sec. 53. Causes Leading to Enactment of the Act to Regulate Commerce.
- Sec. 54. Principles of the Common Law Inadequate to Curb Evils of Railroad Operation.
- Sec. 55. Futile Attempts of the States to Regulate Charges for Interstate Transportation.
- Sec. 56. Effect of the Decision in *Wabash St. L. & P. Ry. Co. v. Illinois*.
- Sec. 57. Power of Congress to Regulate the Duties of Carriers of Interstate Traffic.
- Sec. 58. First Step Towards Federal Regulation of Interstate Transportation by Rail—The Cullom Committee.
- Sec. 59. Report of Collum Committee to Congress and Bill Recommended on January 18, 1886.
- Sec. 60. Fundamental Requirements of the Act to Regulate Commerce as Originally Enacted in 1887.
- Sec. 61. Purpose of Congress in Enacting Original Act to Regulate Interstate Commerce.
- Sec. 62. How the Interstate Commerce Act should be Construed and Interpreted.
- Sec. 63. Commission not Authorized Under Original Act of 1887 to Prescribe Rates for Transportation.

§ 52. **Brief Historical Review of Federal Control over Carriers and Scope Thereof.** More than thirty years have passed since the Act to Regulate Commerce was enacted. During that period the control and regulation of all the interstate traffic of common carriers by railroad have passed from the domain of the common law and the dubious powers of state statutory enactments to the federal government. The rights of shippers of interstate freight, and the liabilities of railroad, express, sleeping car, pipe line, telegraph, telephone and cable companies as to all their interstate traffic, are now governed by the federal statutes and applicable common

law principles as interpreted and applied in the federal courts.<sup>1</sup>

Commencing with the regulation of rates and charges and discriminations in all forms, the federal authority has been extended from time to time until now nearly every phase of interstate transportation by railroad and transmission of messages by telegraph, telephone and cable, is governed by the federal laws and federal decisions. As to all interstate and foreign shipments by the carriers subject to the Act, the law of liability has been changed so that the rights, duties and liabilities relating thereto can no longer be found and ascertained in state statutes and state decisions construing the common law. State courts have often been slow to grasp this silent evolution of the law of interstate carriers, as the number of decisions by the United States Supreme Court overturning the opinions of the state courts will disclose. But with whatever regret we may view the passing of the diversified control of states over interstate carriers, it is now well recognized and thoroughly established that the rights of shippers of interstate freight and the liabilities of interstate carriers relating thereto, are governed by one uniform law throughout the nation, and as interpreted by the controlling decisions of the highest tribunal—the United States Supreme Court.

In this part of the treatise, an endeavor will be made to review the beginning of federal control over

1. *Cincinnati, N. O. & T. P. Ry. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, L. R. A. 1917A 197; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C i, Ann. Cas. 1915B 475.

carriers by railroad; its expansion and development by amendments; the carriers and character of shipments subject to the Interstate Commerce Act; the duties placed upon interstate carriers under the provisions of the statute and its amendments; the rights of shippers under each of the substantive provisions of the act; the nature, power and jurisdiction of the Interstate Commerce Commission; the liabilities of initial carriers for loss and damage on the lines of connecting carriers, and the jurisdiction and power of the courts in enforcing the provisions of the Interstate Commerce Act.

**§ 53. Causes Leading to Enactment of the Act to Regulate Commerce.** During the two decades following the Civil War the railroads of the country became the principal instrumentalities for the movement of commerce from one state to another and to ports of transshipment for export to foreign countries. Profiting by the generous laws of the states, and municipal aid given in the early days of railroad construction, the carriers extended their lines with wonderful rapidity and soon acquired a monopoly of the business of the transportation of freight and passengers. Free from federal control and in a large measure immune from the statutory regulations of the state, the evils of monopolies soon began to show themselves.

The carriers scarcely recognized that they occupied a position of public trust and that their rail highways were quasi public in character. They continued to operate their lines as though they were strictly private enterprises with no duties or obligations whatever towards the public, except, possibly, to carry the freight of all offered for shipment. Rebates and concessions were granted, sometimes secretly and often openly to large and powerful shippers, a practice which lead often to the ruin and bankruptcy of small shippers not enjoying like favors. Discriminations between localities and communities prevailed, and rates to favored communities much lower than to other localities entitled to like treatment, were established and

maintained. The carriers had the unrestricted power to build up one city and to destroy another by granting lower freight rates to the former. Both shippers and localities were helpless under this regime of unfettered control. With a disregard of the elementary duties of common carriers that now seems amazing, the carriers continued in the 70's and 80's to violate nearly every tenet of the common law as to their obligations and duties. Different rates to shippers under like conditions were collected; pools and combinations with each other leading to the oppression of entire communities were effected and enforced; gross inequalities between cities and communities entitled to like treatment were practiced and fixed rates for all under like conditions depended upon the whims of traffic managers. Railroads were operated solely with a view of benefiting stockholders and with little regard for the obligations due to treat all shippers alike and without discrimination.<sup>2</sup>

2. In its first annual report, the Interstate Commerce Commission, commenting upon conditions of railway traffic in this country prior to the adoption of the Interstate Commerce Act, said: "The system of making special arrangements with shippers was in many parts of the country not confined to large manufacturers and dealers, but was extended from person to person under the pressure of alleged business necessity, or because of personal inopportunity or favoritism, and even in some cases from a desire to relieve individuals from the consequences of previous unfair concessions to rivals in business. The result was that shipments of importance were commonly made under special bargains entered into for the occasion, or to stand until revoked, of which the ship-

per and representative of the road were the only parties having knowledge. These arrangements took the form of special rates, rebates and drawbacks, underbilling, reduced classification, or whatever might be adapted to keep the transaction from the public; but the public very well understood that private arrangements were to be had if the proper motives were presented. The memorandum book carried in the pocket of the general freight agent often contained the only record of the rates made to the different patrons of the road, and it was in his power to place a man or a community under an immense obligation by conceding a special rate on one day, and to nullify the effect of it the next day by doing even better by a competitor. The system, if it can be called such, in-



§ 54. **Principles of the Common Law Inadequate to Curb Evils of Railroad Operation.** Prior to the enactment of the Interstate Commerce Act, the principles of the common law controlled the respective rights and liabilities of carriers and shippers of interstate traffic;<sup>3</sup> but these duties only required that the carriers

involved a great measure of secrecy, and its necessary conditions were such as to prevent effective efforts to break it down, though the willingness to make the effort was not wanting among intelligent shippers. It was of the last importance to the shipper that he be on good terms with those who made the rates he must pay; to contend against them was sometimes regarded as a species of presumption which was best dealt with by increasing burdens; and the shipper was cautious about incurring the risk. Nevertheless it was a common observation, even among those who might hope for special favors, that a system of rates, open to all and fair as between localities, would be far preferable to a system of special contracts, in to which so large a personal element entertained or was commonly supposed to enter. Permanence of rates was also seen to be of very high importance to every man engaged in business enterprises, since without it business contracts were lottery ventures. It was also perceived that the absolute sum of money charges exacted for transportation, if not clearly beyond the bounds of reason, was of inferior importance in comparison with the obtaining of rates that should be open, equal, relatively just as between places, and as steady as in the nature of things was practicable."

3. *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844. In *Western U. Tel. Co. v. Call Pub. Co.*, supra, the Court said: "Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrim-

carry for all persons who applied in the order in which the goods were delivered at the station, that the charge for transportation should be reasonable and that the same charge should be made to all persons for like services.<sup>4</sup> The common law, however, did not require the publication or filing of rates and prohibit departures therefrom. It did not prohibit a greater compensation for the transportation of passengers or property for a shorter than for a longer distance over the same line or route in the same direction. The pooling of freights of different railroads or agreements dividing the net profits were not illegal.

In addition, the common law remedies for a violation of the duties of a carrier were entirely inadequate. If a shipper were charged an unreasonable sum for the transportation of his property, it is true he had a right to recover by suit the difference between a reasonable

ination. To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no Federal common law, and that such has been the ruling of this court; there was no Federal statute law at the time applicable to this case, and as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rates is left entirely to the judgment or whim of the telegraph company. \* \* \* There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there

is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statute of Congress."

4. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896; United States ex rel. Morris v. Delaware, L. & W. R. Co., 40 Fed. 101; Handy v. Cleveland & M. R. Co., 31 Fed. 689; Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co., 31 Fed. 652; Menacho v. Ward, 27 Fed. 529; John Hays & Co. v. Pennsylvania Co., 12 Fed. 309.

sum and the unreasonable rate charged, but a recovery did not prevent a repetition of the same charge for a subsequent transportation. The expense and cost of litigating the reasonableness of a rate for each shipment compared with the advantages gained to the shipper, rendered litigation almost prohibitive, and the practical result, under the common law, was that the requirement of a reasonable rate was not such as to deter the carriers from continuing to make and collect unlawful rates and charges.<sup>5</sup> That the remedies at common law were inadequate was also the conclusion of the Cullom Committee after a country-wide investiga-

5. In its first annual report, the Interstate Commerce Commission said: "The common law still remained operative, but there were many reasons why it was inadequate for the purposes of complete regulation. One very obvious reason was that the new method of land transportation was wholly unknown to the common law, and was so different from those under which common law rules had grown up, that doubts and differences of opinion as to the extent to which those rules could be made applicable were inevitable. A highway of which the ownership is in private citizens or corporations who permit no other vehicles but their own to run upon it bears obviously but faint resemblance to the common highway upon which every man may walk or ride or drive his wagon or carriage. If we undertake to apply to the one the rules which have grown up in relation to the other, there must necessarily be a considerable period in which the State law will, in many important particulars, be uncertain and while that continues to be the case,

those who have the power to act and must necessarily act by rule and according to some established system, will for all practical purposes make the law, because the rule and the system will be of their establishment. Such, to a considerable extent was the fact regarding the business of transporting persons and property by rail. Those who controlled the railroads not only made rules for the government of their own corporate affairs, but very largely also they determined at pleasure what should be the terms of their contract relations with others, and others have acquiesced, though often times unwillingly, because they could not with confidence affirm that the law would not compel it, and a test of the question would be difficult and expensive. The carriers of the country were thus enabled to determine in great measure what rules should govern the transportation of persons and property; rules which intimately concerned the commercial, industrial, and social life of the people."

tion.<sup>6</sup> That Committee, in its report to Congress, said: "If it is found that the common law and the courts do not, in fact, afford to the shipper an effective remedy for his grievances, we have no need to inquire to what extent grievances may exist. The complicated nature of the countless transactions incident to the business of transportation make it inevitable that disagreements should arise between the parties in interest, and it is neither just nor proper that disputed questions materially affecting the business operations of a shipper should be left to the final determination of those representing an opposing financial interest. When such disagreements occur the shipper and the carrier are alike entitled to a fair and impartial determination of the matters at issue, and by all the principles governing judicial proceedings the most fair-minded railroad official is disqualified by his personal interest in the result from giving such a determination. If, however, there existed an impartial tribunal to which the shipper could readily appeal, he would find less occasion for appealing from the decision of the carrier, and differences between shipper and carrier would be more likely to be adjusted amicably without such an appeal. The simple fact that the shipper is now obliged to submit to the adjudication of his complaint by the other party in interest, the party by whom he supposes himself to have been aggrieved, is in itself sufficient to demonstrate the necessity of such legislation as will secure to the shipper that impartial hearing of his complaints to which he is entitled by all the recognized principles of justice and equity. Evidence is not wanting to prove that the remedy at common law is impracticable and of little advantage to the ordinary shipper. It has been found so by the people of the States in dealing with their local traffic, and, as has been shown, their recognition of the fact has been authoritatively recorded in nearly every State in the Union by statutory enactments, and in many of them by the es-

6. Section 59, *infra*.



establishment of commissions, in the effort to provide for the shipper that prompt and effective remedy which it has been found by experience that recourse to the common law has failed to afford. The reasons for this failure apply with even greater force to the more complicated transactions of interstate commerce than to State traffic, because the former involved more perplexing questions and are affected by a greater diversity of varying conditions. The legislation of the States, the reports of the State commissions, the records of the courts, the evidence of shippers, and, in short, the whole current of testimony, is to the same effect; and the fact stated is also admitted by some of the highest railroad authorities.”

**§ 55. Futile Attempts of the States to Regulate Charges for Interstate Transportation.** Long before Congress awoke to the necessity of legislative enactment to prevent the continuous wrongs of carriers towards shippers, many of the states attempted to supply the defects of the common law by statutory enactments. In some states the legislative assemblies attempted to pass statutes fixing rates even on shipments to other states, while in others administrative bodies, commonly known as railroad commissioners, were created with more or less control over the rates and charges of the carriers; but with the conflicting rules and regulations of each state, and the doubt as to the extent of the authority of the states over interstate carriers, little was accomplished to curb the evils then existing in the railroad transportation of the country.<sup>7</sup> “In the exercise of their undoubted right to regulate, the States have been hampered by their inability to apply their regulations to interstate commerce, which comprises, in most instances, the greater

7. A summary of the laws of the states regulating common carriers is given in the Fourth Annual Report of the Interstate Commerce Commission, and also

in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

portion of the business transacted within their borders by railroads. The essence of the effective regulation of business transactions is equality and uniformity, and this is impossible as to two transactions alike in every other respect when one reaches across a State line and the other does not. In the controversies that naturally arose over these questions in different States, as the records of the courts demonstrate, the railroad companies have not hesitated at every opportunity to insist upon and take advantage of the exclusive power of Congress to regulate interstate commerce. And, on the other hand, the records of Congress show that they have been equally swift to maintain and to deprecate interference with the rights of the States whenever national regulation has been proposed. With its authority restricted to less than half of the business operations of the transportation companies subject to its jurisdiction, the obstacles encountered by a State in the exercise of a satisfactory supervision over the railroads engaged in business within its borders and in the administration of equal justice to all its citizens who might use them are apparent. When these difficulties, with all the opportunities they present for evasion of the State's authority, are understood, it is not a matter of wonder that the various State commissions should fail to accomplish all that has been expected of them, but it is rather a matter of surprise that they should have succeeded in bringing about the beneficial results which are acknowledged as a result of their labors."<sup>8</sup>

§ 56. **Effect of the Decision in Wabash, St L. & P. Ry. Co. v. Illinois.** An increased demand for federal regulation of interstate carriers followed the decision of the United States Supreme Court in the Wabash case<sup>9</sup> holding that the powers of a state were limited to the regulation of rates and charges for freight

8. Report of Cullom Committee, section 59, *infra*.

*v. People*, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4.

9. *Wabash, St. L. & P. Ry. Co.*

transportation beginning and ending within its limits. The growing practice of charging unreasonable rates and discriminating between shippers and localities received a new impetus when the carriers found themselves free from the danger of penalties prescribed by state laws. The urgent requirement of governmental control and regulation was now plainly evident, for the abuses of railroad operation, under the decision in the *Wabash* case, could not be curbed by state control and regulation.

**§ 57. Power of Congress to Regulate the Duties of Carriers of Interstate Traffic.** The Constitution delegates to Congress the power "to regulate commerce with foreign nations, among the several states and with the Indian Tribes." Long before the Act to Regulate Commerce was passed, this provision of the Constitution had been judically construed and interpreted by the Supreme Court as authorizing the widest latitude to Congress in prescribing the rules by which commerce might be transported from one state to another or to foreign countries.. This power, it was held,<sup>10</sup> was complete in itself, might be exercised to its utmost extent and acknowledge no limitation, and was vested in Congress as absolutely as it would be in a single government. The authority of Congress, under this clause of the Constitution, extends to every part of interstate commerce and to every instrumentality and agency by which it is carried on.<sup>11</sup>

In so far as their interstate traffic is concerned, railroads are but agencies used in its transportation from one state to another. Unreasonable rates, practices, charges and classifications, and unjust discriminations and preferences in any form between shippers of interstate freight are, therefore, burdens upon interstate commerce which Congress may regulate or prohibit. So clearly were the provisions of the original Act to Regulate

10. *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.)

11. *The Minnesota Kate Cases*,

1151, Ann. Cas. 1916A 18.

Commerce considered to be within the domain of the power given to Congress to regulate commerce among the states, that no serious attempt was made to have it declared invalid. In holding that the means therein adopted by Congress to protect interstate commerce from unnecessary burdens were a matter of legislative discretion, the Supreme Court said:<sup>12</sup> "Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that 'the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of affecting the object is excepted, take upon themselves the burden of establishing that exception.' 4 Wheat. 316, 409. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to affect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institu-

12. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125.



tions. *Sinking Fund Cases*, 99 U. S. 700, 718. An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

**§ 58. First Step Towards Federal Regulation of Interstate Transportation by Rail—The Cullom Committee.** The United States Senate, on March 17, 1885, adopted a resolution authorizing the President to appoint a select committee of five senators to investigate and report upon the subject of the regulation of transportation by railroad and water routes in connection or in competition with railroads, of freight and passengers between the several states, with authority to sit during the recess of Congress, and with power to summon witnesses and to make a thorough investigation and to report to the Senate. Pursuant to this resolution, President Cleveland on March 21, 1885 appointed Senators Cullom, Miller, Platt, Gorman and Harris, and this body was thereafter known and referred to as the Cullom Committee. A country-wide investigation followed.

The committee held hearings in various towns and cities all over the United States with a view of determining and recommending to Congress the best measures

for correcting the then evils of railroad transportation. Preliminary to the investigation, the committee issued and published a circular calling for certain information that would be of practical value to Congress in framing legislation for the regulation of commerce between the several states. These inquiries called for information as to the best method of preventing extortion and unjust discriminations by corporations engaged in interstate commerce, whether publicity of rates should be required by law, the advisability of establishing a system of maximum and minimum rates, whether rebates and drawbacks should be regulated by law or entirely prohibited, whether a lower proportionate rate should be charged for a long than for a short haul, the advisability of requiring carriers to adopt a uniform system of accounts, and to make annual reports to the Government, and in what manner national legislation for the regulation of interstate traffic should be best enforced. The testimony before the committee was preserved and printed as a part of its report.<sup>13</sup>

**§ 59. Report of Cullom Committee to Congress and Bill Recommended on January 18, 1886.** The Cullom Committee as a result of its investigation introduced in Congress a bill for the regulation of interstate carriers by rail. This measure, with minor amendments, became a law on February 4, 1887. It was popularly known as the Cullom Act but was officially designated as the Act to Regulate Commerce.<sup>14</sup> "This measure," said the Committee in introducing the bill,<sup>15</sup> "is not offered as a panacea for all the evils growing out of the management of the transportation system of which the people have for years complained, and for which they are disposed to seek a legislative cure. Indeed, as we have already said, 'That a problem of such magnitude, importance, and intricacy can be summarily solved by any master-stroke of legislative wisdom is beyond the bounds

13. Senate Report No. 46, Part 2, 1st Session, 49th Congress.

14. Appendix A, *infra*.

15. Senate Report No. 46, Part 1, 1st Session, 49th Congress.

of reasonable belief.' Neither is it simply a tentative measure intended to pave the way for additional legislation. Its practical application, if it should become a law, may demonstrate that some of its features are inexpedient, or unjust to the corporate carriers of the country, or prejudicial to the public interests. While there have naturally been differences of opinion among the members of the committee as to certain of the less important features and provisions of the bill in its entirety, and in its general scope, purposes, and methods, it represents the substantially unanimous judgment of the committee as to the regulations which are believed to be expedient and necessary for the government and control of the carriers engaged in interstate traffic. The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to the rates, financial operations, and methods of management of the carriers."

The committee also submitted an exhaustive and elaborate report, now known as the Cullom report, which contained a review of the growth and extent of the railroad systems of the United States; the magnitude of the railway service; the internal commerce of the United States as illustrated in the traffic of the trunk lines, both east and west bound; the relation of commerce to agriculture; the power of Congress to regulate commerce, together with a synopsis of the decisions of the United States courts on the subject; the legal status of common carriers and the obligations imposed upon them by reason of their public nature and the exercise of public functions; the difficulties of effective state regulations; the evils of railroad

operation as exemplified by an irresponsible management and fictitious capitalization; the various methods of railroad regulation including the work of the English commission; a summary of the provisions of state statutes then in effect for the regulation of railroads; the comparative volume of state and interstate traffic; the relation between water routes and railroads with a plea for their complete emancipation;<sup>16</sup> the necessity of national legislation for the regulation of interstate commerce; the causes of complaints against the railroad system; the principles upon which railroad rates should be established and the limitations upon discriminations; the advisability of the publicity of rates by posting as a means of preventing unjust discriminations, and the necessity for the establishment of a national commission for the enforcement of the proposed legislation.

**§ 60. Fundamental Requirements of the Act to Regulate Commerce as Originally Enacted in 1887.** The original Act to Regulate Commerce consisted of two parts—substantive and procedural. The former placed certain duties upon railroads engaged in the transportation of interstate and foreign traffic, while the latter provided the means and methods by which those duties might be effectually enforced and observed. The leading and prominent features of the act are herein briefly reviewed. Section 1 of the Act provided that the statute was applicable to all common carriers engaged in transportation wholly by railroad or partly by water and partly by railroad under a common control or management, from one state to another or from any place in the United States to a foreign country, and further prescribed that all charges made by such carriers for transportation services must be reasonable and just. Sections 2 and 3 prescribed that the same charges must be made for a like and contemporaneous

16. This proposal was not adopted until the passage of the Panama Canal Act in 1912.



service and prohibited any undue or unreasonable preference between persons, localities or kinds of traffic. Section 4 prohibited carriers from charging more for transportation for a shorter than for a longer distance over the same line in the same direction under substantially similar circumstances and conditions.

All contracts and combinations for the pooling of freights of competing railroads, or dividing the earnings between them, were declared unlawful by Section 5. Section 6 required all carriers subject to the act to print and keep open for public inspection all their tariffs for the transportation of persons and property, and provided that no advance in rates could be made without ten days' public notice, but a reduction in rates might be made to take effect at once, the notice of the same to be immediately and publicly given. Copies of all tariffs were required to be filed with the Interstate Commerce Commission as well as all contracts or agreements between carriers in relation to traffic affected by the Act. Notices of all changes in the tariffs were also required to be filed. Section 7 prohibited any combination or device which would prevent the carriage of freight from being continuous from the place of shipment to the place of destination. Section 8 provided that any common carrier violating any of the provisions of the Act should be liable to any person injured thereby to the full amount of his damages, together with a reasonable attorney's fee. Sections 9 to 24 inclusive related largely to matters of procedure and the enforcement of the substantive provisions of the Act. For example, by Section 11, the Interstate Commerce Commission was created and established to be composed of five members to be appointed by the President with the advice and consent of the senate, for a term of six years. Sections 12, 13 and 14 gave certain powers to the Interstate Commerce Commission. The foregoing is by no means a complete resume of the provisions of the original Act, but gives the reader a general survey of the field and subject matter covered by the statute.

§ 61. **Purpose of Congress in Enacting Original Act to Regulate Interstate Commerce.** The leading purpose of Congress in the enactment of the original Act to Regulate Commerce in 1887 was to establish and impose upon railroads engaged in interstate commerce the duty of making their charges for transportation services rendered, reasonable and just, and to prohibit unjust discriminations, preferences, partiality and inequality between persons, traffic and localities similarly situated.<sup>17</sup> One of the means employed by Congress to secure these results was the placing upon all carriers subject to the statute the duty to establish and publish schedules of rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by the law.<sup>18</sup>

The building up of one locality at the expense of another by rates favoring the former, was one of the evils which Congress sought to destroy.<sup>19</sup> "The principal objects of the Interstate Commerce Act," said the United States Supreme Court in another case,<sup>20</sup> "were to secure just and reasonable charges for trans-

17. *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Kinnavey v. Terminal R. R. Ass'n. of St. Louis*, 81 Fed. 802; *United States v. Hanley*, 71 Fed. 672; *United States v. Missouri Pac. Ry. Co.*,

65 Fed. 903; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 37.

18. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700.

19. *Board of Trade of Hampton, Florida v. Nashville, C. & St. L. Ry. Co.*, 8 I. C. C. 503.

20. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

portation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road."<sup>21</sup>

§ 62. **How the Interstate Commerce Act should be Construed and Interpreted.** As the great purpose of the original act was to secure equality of rates to all and favoritism to none by requiring the publication of tariffs and prohibiting departures therefrom, and by forbidding rebates, unjust preferences and all other forms of undue discriminations, the statute is, therefore, remedial and should receive an interpretation by the Commission and the courts which reasonably accomplishes the public purpose which it was enacted to subserve.<sup>22</sup> But interstate commerce is one of the most important subjects of national legislation, and the courts will, in the interpretation of the statute, attribute to Congress an intention to promote and facilitate, not to hamper or destroy the movement of commerce from one state to another.<sup>23</sup> The statute should be liberally construed in favor of commerce among the states.<sup>24</sup>

21. See also *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428.

22. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272; *Interstate Commerce Commission v. East Tennessee V. & G. Ry. Co.*, 85 Fed. 107; *Van Patten v. Chicago,*

*M. & St. P. Ry. Co.*, 81 Fed. 545; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

23. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 366.

24. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

The intent of Congress must be gathered from the entire statute and not from detached portions thereof, and the evil sought to be remedied by the Act should always be kept in mind.<sup>25</sup> Subject to the provisions prohibiting unreasonable rates, practices, classifications and charges, and unjust discriminations between traffic, individuals and localities, the statute should not be construed as to deprive the common carriers of their right under the common law to manage their properties upon the same principles adopted in other trades and pursuits. In other words, the statute regulates carriers in their public, but not in their private, capacity.<sup>26</sup> In construing the Act, the courts are required to take into consideration not only the interests of shippers in large cities, but also the carriers themselves and the consumers in other localities.<sup>27</sup>

**§ 63. Commission not Authorized Under Original Act of 1887 to Prescribe Rates for Transportation.** As the original Act provided in Section 1 that all charges must be reasonable and just, and that all unjust and unreasonable rates and charges shall be deemed unlawful, and further provided in Section 12 that the Interstate Commerce Commission was authorized to enforce the provisions of the Act, the Commission, for many years after its creation, assumed the authority and power to prescribe rates which should be charged by interstate common carriers in the future in addition to its conceded authority to inquire whether rates which had been charged and collected were reasonable—the former

25. *Van Patten v. Chicago, M. & St. P. Ry. Co.*, 81 Fed. 545.

26. *Interstate Commerce Commission v. Chicago Great Western R. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409; *Interstate Commerce Com-*

*mission v. Baltimore & O. R. Co.*, 43 Fed. 37.

27. *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409.



being a legislative act, and the latter a judicial act.<sup>28</sup>

Upon a complaint of the Chicago and Cincinnati freight bureaus against a number of railway companies that the rates on several classes of freight from said cities respectively, to the City of Atlanta, Ga., and other places south of the Ohio River, were unreasonably high, the Commission, after a hearing, decided that the rates complained of were unreasonable and unjust and in violation of the Act. The Commission thereupon ordered the carriers to cease and desist from charging more than the rates therein prescribed by the Commission.<sup>29</sup> The Commission petitioned the court to require the carriers to obey the order after they had refused to reduce the rates in conformity therewith. The Circuit Court of Appeals certified the case to the United States Supreme Court, and that court held that Congress had not, in the Act to Regulate Commerce, conferred upon the Commission the legislative power of prescribing rates, either maximum, minimum, or absolute, and, therefore, the Commission did not have any power to fix and prescribe rates which should control in the future.<sup>30</sup> From the date of this decision, May 24, 1897, until the Hepburn amendment of 1906 became effective, the Commission did not attempt, and had no power, to prescribe just and reasonable rates or charges to be thereafter collected as the maximum by the carriers.

28. *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct. 484; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462, 702.

29. *Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co.*, 6 I. C. C. 195; *Chicago*

*Freight Bureau v. Louisville, N. A. & C. R. Co.*, 6 I. C. C. 195.

30. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896. See also *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700, known as the *Social Circle Case*.

## CHAPTER V

### CHRONOLOGICAL REVIEW OF LEADING AMENDMENTS TO STATUTE.

- Sec. 64. Scope of the Chapter.
- Sec. 65. Amendments of 1889 and 1891 to the Interstate Commerce Act.
- Sec. 66. Invalid Provision of Section 12 Remedied by Passage of Compulsory Testimony Act of 1893.
- Sec. 67. Provisions Prohibiting Rebates and Discriminations Strengthened by Passage of Elkins Act of 1903.
- Sec. 68. Scope of Act and Powers of Commission Greatly Extended Through Amendments Incorporated by Hepburn Act of 1906.
- Sec. 69. Initial Carrier Liable for Loss and Damage on Lines of Connecting Carrier—Carmack Amendment.
- Sec. 70. Commission Empowered to Order Switch Connection with Private Side Tracks and Lateral Branch Lines.
- Sec. 71. Carriers Prohibited from Owning or Having an Interest in Freight Transported—the Commodity Clause.
- Sec. 72. Amendments Authorizing Commission to Prescribe Through Routes and Joint Rates.
- Sec. 73. Commission Authorized to Determine Allowances to Shippers for Services Rendered in Connection with Transportation.
- Sec. 74. Amendment of 1906 Prohibiting the Issuance and Giving of Free Passes—Persons Excepted.
- Sec. 75. Forms of All Accounts, Records and Memoranda Kept by Interstate Carriers Placed under Jurisdiction of Commission.
- Sec. 76. Amendments and Additions to the Statute by the Mann-Elkins Act of 1910.
- Sec. 77. Fraudulent Claims for Loss and Damage by Shippers Against Carriers Penalized.
- Sec. 78. Power Conferred upon Commission by 1910 Amendment to Suspend Proposed Changes in Rates.
- Sec. 79. The 1910 Amendment to the Long and Short Haul Provision.
- Sec. 80. Statutory Duty of Carriers to Route Interstate Freight as Directed by Shippers.
- Sec. 81. Carriers and Their Agents Prohibited from Giving Information Relating to Business of Interstate Shippers.
- Sec. 82. Extension of Jurisdiction of Commission over Water Carriers by Panama Canal Act of 1912.
- Sec. 83. Act of 1913 Requiring Commission to Ascertain Valuation of Property Owned or Used by all Interstate Carriers.
- Sec. 84. Amendment of 1917 Penalizing Persons for Obstructing Movement of Interstate Commerce During War.

Sec. 85. President Authorized During War to Direct Movement of Commodities Essential to National Defense.

**§ 64. Scope of the Chapter.** Since the enactment of the original Act to Regulate Commerce in 1887, the statute has been frequently amended. The general tendency of these amendments has been to greatly extend the scope of the original statute and to increase the powers of the Interstate Commerce Commission. In addition, many defects were found in the enforcement of the Act and most of these have been remedied by amendatory legislation. Under the original Act, the Interstate Commerce Commission was primarily an investigating body with but few powers over the carriers. At the present time it has a vast and extensive control over the interstate traffic not only of common carriers by railroad, but also pipe line, express, sleeping car, telegraph, telephone and cable companies.

In examining the decisions of both the federal and state courts construing the provisions of the Interstate Commerce Act, the dates, and the nature of the important amendments passed from time to time during the three decades of the existence of the Commission, should be considered; for frequently amendments have been adopted to correct defects found by the courts in the Act or to give powers and authority to the Commission which the courts had held it did not possess. In this chapter the author will briefly review, in chronological order, the important amendments to the Act commencing with the first in 1889 to the last amendments previous to the date of the publication of this work.

**§ 65. Amendments of 1889 and 1891 to the Interstate Commerce Act.** The first amendments to the Interstate Commerce Act, passed on March 2, 1889, consisted of changes in or additions to sections 6, 10, 12, 14, 16, 17, 18, 21, and 22, and also a new paragraph now designated as Section 23 of the Act. Some of these amendments introduced no radical changes in the statute but others added provisions which tend to render the enforcement of the act more effective. The new

section added by the 1889 amendment provided that if any carrier refused to carry any interstate traffic for any shipper at the same rates or upon the same conditions and terms given other shippers for like traffic under similar conditions, or refused to furnish cars or other vehicles for transportation, the shipper so discriminated against might apply to the courts for a writ of mandamus to compel the carrier to move and transport such traffic or to furnish such facilities without a preliminary investigation by the Commission.

An amendment to Section 6 provided, in addition to the fine prescribed by the original Act, imprisonment for officers or agents of carriers found guilty of any unlawful discrimination in rates, fares or charges for the transportation of passengers or property. Section 6 was further amended by the insertion of a penal provision which prohibited, under a penalty of imprisonment or a fine, or both, any person or any agent of a corporation from obtaining transportation at less than the regular established rate by false billing, classification, weighing, report of weight or any other device or means with or without the consent of the carrier, or who, by the payment of money or otherwise, induced a carrier or its agents to discriminate unjustly in his favor as against other shippers in the transportation of property, or aided or abetted a common carrier in any such unlawful discrimination.

A further provision with a like penalty prohibited the carriers subject to the Act, or their officers and agents, from granting or permitting the transportation of property at less than the scheduled and established rate, by any false billing, classification, weighing or other means or devices. Under the original Act, reductions in rates or fares were permitted to be made without any previous public notice, the only requirement being that whenever the reduction was made, notice of the same was immediately to be given. One of the amendments of 1889 required three days' previous notice of any reduction in any published rates, fares or charges. Another amendment to Section 6



provided that no advance should be made in joint rates, fares or charges except after ten days notice to the Commission, and no reductions were permitted in such joint rates except after three days notice to the Commission. The carriers were also prohibited from collecting a greater or less compensation for the transportation of property between any points as to which a joint rate or fare was named thereon than was specified in the schedule filed with the Commission.

An amendment to Section 12 required all district attorneys of the United States to whom the Commission might apply, to institute in the proper court and to prosecute all necessary proceedings for the enforcement of the provisions of the Interstate Commerce Act. An amendment to Section 14 prescribed that the Commission might provide for the publication of its reports and decisions and that such authorized publications should be competent evidence of the reports and decisions of the Commission therein contained in all the courts of the United States and of the several states without any further proof or authentication thereof. Under the original Act the authority of the Commission to employ assistants and fix their compensation was subject to the approval of the Secretary of Interior, and the annual report of the Commission was required to be made to the Secretary of Interior. Both of these provisions as to the Secretary of Interior were eliminated from the Act by the amendment of 1889.

Section 22 of the original Act was further amended by a provision that nothing in the statute should be construed to prevent the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or to give reduced rates to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge. Section 12 was further amended in 1891 by a provision authorizing the

Commission to require witnesses to attend and the production of documentary evidence at any place in the United States at any designated place of hearing, and in case of a disobedience to a subpoena, the Commission, or any party to a proceeding before the Commission, were permitted to invoke the aid of the courts of the United States in requiring the attendance of the witnesses and the production of books. The amendment further provided that the testimony of any witness in any proceeding or investigation pending before the Commission might be taken by deposition at any time after a cause or proceeding was at issue on petition and answer.

§ 66. **Invalid Provision of Section 12 Remedied by Passage of Compulsory Testimony Act of 1893.** The provision in the third paragraph of Section 12 of the original Act that no person could be excused from testifying before the Interstate Commerce Commission as to any violation of the Act because such testimony might tend to incriminate him, was, in 1892, held to be invalid on the ground that it was in violation of the Fifth Amendment of the Constitution providing that no person should be compelled in a criminal case to be a witness against himself.<sup>1</sup> The Supreme Court, in the case cited, held that the clause "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding" was not broad enough to afford absolute immunity from all future prosecutions.

To remedy this defect, Congress passed the statute known as the Compulsory Testimony Act of February 11, 1893, which is as follows: "That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission,

1. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195.

whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the Act of Congress, entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment."<sup>2</sup> The act of 1893 was held to be valid and not a violation of the Fifth Amendment of the Constitution.<sup>3</sup>

The statute was amended in 1906 by the addition of a provision which declared that the immunity therein granted should extend only to a natural person, who in obedience to a subpoena, gives testimony under oath

2. 27 Stat. at L. 443.

591, 40 L. Ed. 819, 16 Sup. Ct.

3. *Brown v. Walker*, 161 U. S. 644.

or produces evidence, documentary or otherwise, under oath.<sup>4</sup>

**§ 67. Provisions Prohibiting Rebates and Discriminations Strengthened by Passage of Elkins Act of 1903.**

The federal statute commonly known as the Elkins Act, approved February 19, 1903, although passed in the form of an independent measure, was in fact an amendment, and the first important amendment to the Act to Regulate Commerce since 1889. This Act corrected serious defects in the original law and greatly aided the attainment of some of the purposes for which the original Act was enacted. Its scope and effect will be readily understood when the two main objects of the original Act are kept in mind, that is, to secure the publication of just and reasonable tariff rates free from discriminations and to compel carriers to observe the tariffs so filed without variation or exception. The Elkins Act made a railway corporation, itself engaged in the business of a common carrier, liable to prosecution in all cases where only its officers and agents were liable under the former law. This change in the statute made the principal guilty as well as the agent, and corrected a defect which had always been a source of embarrassment in former prosecutions because the statute theretofore gave immunity to the principal and beneficiary of a guilty transaction. However, the penalty of imprisonment for a violation of the Act was abolished. As the corporation could not be imprisoned, Congress deemed it expedient that no greater punishment be visited upon the offending officer or agent than upon the corporation itself.<sup>5</sup>

The most important change in the Act to Regulate Commerce which the Elkins Act affected was the provision which declared that the published rate should conclusively be deemed to be the legal rate and the

4. 34 Stat. at L. 798.

5. The penalty of imprisonment was restored by the Hepburn Amendment of 1906, with an ad-

ditional penalty of three times the amount of money received or accepted as a rebate to be forfeited to the United States.



standard of lawfulness. Any departure therefrom was declared to be a misdemeanor.<sup>6</sup> The result of this feature of the statute was to make the shipper liable whenever the carrier was liable, and either or both might be convicted by simply proving that the rate charged was not covered by the tariff applicable to the transaction.<sup>7</sup> The statute further provided that the act or omission of any officer or agent of a common carrier acting within the scope of his employment should be deemed to be the act or omission of the carrier itself as well as that of the agent. Another provision conferred jurisdiction upon the circuit courts of the United States to restrain departures from published rates on file or any discrimination forbidden by law by writ of injunction or other appropriate

6. *New York Cent. & H. River R. Co. v. United States*, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; *Chicago & A. R. Co. v. United States*, 212 U. S. 563, 53 L. Ed. 653, 29 Sup. Ct. 689; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428.

7. The difficulties in enforcing the provisions of the Interstate Commerce Act prohibiting discriminations, prior to the passage of the Elkins Act, were well stated by the Interstate Commerce Commission in its 17th Annual Report, as follows: "As the former law was construed by the courts, it was not sufficient to show that a secret and preferential rate had been allowed in a particular case; there had to be further proof of the payment of schedule charges, or at least higher charges than those in question, by some other person on like and contemporaneous shipments. That is, it was necessary to prove discrimination in fact as between shippers entitled to the same rates by reason of re-

ceiving the same service. The practical result of this construction was to render successful prosecutions extremely difficult, if not impossible, because the required evidence could rarely be secured, and this was particularly the case when there was an extensive demoralization of rates and consequently the most urgent occasion for the use of criminal remedies. Under such circumstances it frequently happened that all shippers received substantially the same rates, however much less than the published tariff, and thus there was no actual discrimination. This aggravating defect appears to have been wholly cured, as the new law (the Elkins Act) in most explicit terms makes the published tariff the standard of lawfulness, as respects criminal misconduct, and any departure therefrom is declared to be a misdemeanor. It is sufficient now, in order to make out a case of criminal wrongdoing, to show that a lower or different rate from that named in the tariff has been accorded."

process. The writ or process thus authorized is enforceable against parties interested in the traffic as well as against the carrier.

§ 68. **Scope of Act and Powers of Commission Greatly Extended Through Amendments Incorporated by Hepburn Act of 1906.** Material changes in and additions to the Act to Regulate Commerce were made by the Hepburn amendment of 1906. The scope of the act and the powers of the Interstate Commerce Commission thereunder were greatly extended. The membership of the commission was increased from five to seven and their salaries from \$7500 to \$10,000 a year. Express<sup>8</sup> and sleeping car companies,<sup>9</sup> engaged in interstate commerce, and persons transporting oil by pipe lines<sup>10</sup> were made subject to the provisions of the statute. The Commission was authorized to establish through routes and joint rates with the terms and conditions under which such through routes should be operated. The punishment of imprisonment for certain violations of the Act, repealed by the Elkins Act of 1903, was restored. No increase or reduction of rates, either joint or separate, was permitted except after thirty days notice, the former Act requiring only ten days notice of an increase and three days notice of a decrease.

The Commission was given the power to determine the maximum amount to be paid a shipper for any service rendered in connection with the transportation of property or any instrumentality used therein. The effect of a decision of the Supreme Court construing the original Act in holding that the Commission was not authorized to prescribe rates for the future,<sup>11</sup> was destroyed by an amendment providing that the Commission was authorized and empowered to determine and prescribe what should be just and reasonable rates or

8. Section 109, *infra*.

9. Section 110, *infra*.

10. Section 106, *infra*.

11. Interstate Commerce Com-

mission v. Cincinnati, N. O. & T. P. Ry. Co., 167 U. S. 479. 42 L. Ed. 243, 17 Sup. Ct. 896. See section 63, *supra*.

charges to be thereafter observed as the maximum to be charged, and what regulation or practice in respect to such transportation was just, fair and reasonable to be thereafter followed. The term "railroad" defined in the original Act as including all bridges and ferries used in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, was further extended and defined so as to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

The term "transportation," defined in the original Act as including all instrumentalities of shipment or carriage, was amended so as to include all cars and other vehicles and all instruments of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage, and handling of property transported. Other important amendments introduced by the Hepburn Act are briefly reviewed in the following paragraphs.<sup>12</sup>

12. The causes for the enactment of the Hepburn Act were given in the report of the Congressional Committee, as follows: "It has been believed by a large portion of the shippers that railway rates were in many instances too high, and that favoritism through rebates and other forms of discrimination were indulged in by various methods by the carriers. The ingenuity of some of the carriers and shippers has resulted in avoiding the provisions of that Act through the use of joint tariffs, involving, in some in-

stances, a railroad and a mere switch owned by a shipper; through arrangements whereby excessive mileage was given to the shipper of products who owned his own cars; through the use of refrigerator cars; through the permission given to independent corporations to render some service incident to the shipment, as the furnishing of ice in the bunkers of the car; by what is known as the 'midnight tariff,' a method involving an arrangement with a shipper to assemble his freights, have them ready for shipment at

**§ 69. Initial Carrier Liable for Loss and Damage on Lines of Connecting Carrier—Carmack Amendment.**

At common law, a carrier accepting a shipment for transportation to a destination point on a connecting line could limit its liability for loss or damage not occurring on its own portion of the route, that is, on its own line. Such a provision in a bill of lading was not a contract for exemption from a carrier's liability as such, but merely a declaration on the part of the carrier that it did not assume the obligation of a carrier beyond its own line. An initial carrier, therefore, might exempt itself from liability for loss or damage through the fault of a connecting carrier.<sup>13</sup>

The hardships placed upon shippers by such provisions in contracts of shipment were well stated by the Supreme Court in the following language;<sup>14</sup> "As a result the shipper could look only to the initial carrier for recompense for loss, damage or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action

a particular date, whereupon the carrier would give the necessary three days' notice of a reduction in the rate. Competing carriers and shippers would know nothing about this arrangement. The freight would be shipped at the new lower rate, and then there would be a restoration of the old rate. The law of to-day would be fairly satisfactory to all shippers if the spirit of fairness required by it had controlled the conduct of the carriers, and the necessity for the proposed legislation is the result of and is made necessary by the misconduct of parties who are now most clamorous against additional restraint. If the car-

riers had in good faith accepted existing statutes and obeyed them there would have been no necessity for increasing the powers of the Commission or the enactment of new coercive measures."

13. *Southern Pac. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 27 L. Ed. 325, 1 Sup. Ct. 425; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 22 L. Ed. 827.

14. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.



against the carrier so shown to have next received the shipment. But here, in turn he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carriers who in turn had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed. This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate."

To remedy the situation thus described confronting interstate shippers, Congress, in 1906, amended Section 20 of the Act by requiring all common carriers engaged in interstate commerce to issue a receipt or a bill of lading for property received, and making the initial carrier liable to the lawful holder of the bill of lading for any loss, damage or injury to the property caused by it or by any common carrier to which such property might be delivered or over whose lines the property might pass in transportation, with the right, however, reserved to the initial carrier to recover from the defaulting connecting carrier any sum it might be required to pay.

This provision is known as the Carmack Amendment,<sup>15</sup> and by its passage, for the first time, the liability

15. The Carmack amendment as originally enacted and before the amendments of March 4, 1915 and August 3, 1916, was as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any com-

mon carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That

ty of interstate carriers for loss, delay, injury or damage to property became under exclusive federal control and subject to applicable common law principles as interpreted and applied in the federal courts.<sup>16</sup>

the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The Carmack amendment as modified by the first and second Cummins amendments is discussed in chapters XV to XVII inclusive, *infra*.

16. **United States.** *New York C. & H. River R. Co. v. Beaham*, 242 U. S. 148, 61 L. Ed. 210, 37 Sup. Ct. 43; *Chesapeake & O. R. Co. v. McLaughlin*, 242 U. S. 142, 61 L. Ed. 207, 37 Sup. Ct. 40; *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555; *L. R. A. 1917A 265*; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541; *Northern Pac. Ry. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, *L. R. A. 1917A 197*; *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U. S. 34, 60 L. Ed. 511, 36 Sup. Ct. 230, *L. R. A. 1917A 193*; *Cleve-*

*land, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, *Ann. Cas. 1916D 333*; *Pierce Co. v. Wells, Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, *L. R. A. 1915B 450*, *Ann. Cas. 1915D 593*; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380, 8 N. C. C. A. 53; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 226 U. S. 593, 57 L. Ed. 58 L. Ed. 697, 34 Sup. Ct. 383; 980, 33 Sup. Ct. 609; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; *Chicago, St. P., M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; *Louisville & N. R. Co. v. Scott*, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. 171; *Chicago & E. I. R. Co. v.*

## § 70. Commission Empowered to Order Switch Connection with Private Side Tracks and Lateral

Collins Produce Co., 149 C. C. A. 169, 235 Fed. 857, 14 N. C. C. A. 917; *Hudson v. Chicago, St. P., M. & O. Ry. Co.*, 226 Fed. 38; *J. H. Halmen & Sons v. Illinois Cent. R. Co.*, 212 Fed. 324.

**Alabama.** *Central of Georgia R. Co. v. Patterson*, 12 Ala. App. 369, 68 So. 513; *Atlantic Coast Line R. Co. v. Ward*, 4 Ala. App. 374, 58 So. 677; *Central of Georgia R. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

**Arkansas.** *Kansas City & M. R. Co. v. Oakley*, 115 Ark. 20, 170 S. W. 565; *Kansas City Southern R. Co. v. Mixon-McClintock Co.*, 107 Ark. 48, Ann. Cas. 1914C 1247, 154 S. W. 205; *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, Ann. Cas. 1912A 610, 130 S. W. 562; *Chicago, R. I. & P. R. Co. v. Miles*, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043.

**Colorado.** *Appel Suit & Cloak Co. v. Platt*, 55 Colo. 45, 132 Pac. 71.

**Florida.** *Fornel v. Florida East Coast R. Co.*, 65 Fla. 102, 61 So. 194.

**Georgia.** *Southern R. Co. v. Waxelbaum Produce Co.*, 19 Ga. App. 64, 90 S. E. 987; *Baltimore & O. R. Co. v. Montgomery & Co.*, 19 Ga. App. 29, 90 S. E. 740; *Southern R. Co. v. Savage*, 18 Ga. App. 489, 89 S. E. 634; *Southern Exp. Co. v. Essig Bros.*, 17 Ga. App. 657, 87 S. E. 1090; *Nashville, C. & St. L. Ry. Co. v. Truitt Co.*, 17 Ga. App. 236, 86 S. E. 421; *Mitchell & Co. v. Atlantic Coast Line R. Co.*, 15 Ga. App. 797, 84 S. E. 227; *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019; *Cranor v. Southern R. Co.*, 13 Ga. App. 86, 78 S. E. 1014; *Post & Woodruff v. Atlantic Coast Line R. Co.*, 138 Ga.

763, 76 S. E. 45; *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865.

**Illinois.** *Looney v. Oregon Short Line R. Co.*, 271 Ill. 538, 111 N. E. 509; *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546, 109 N. E. 281; *Gamble-Robinson Commission Co. v. Union Pac. R. Co.*, 262 Ill. 400, Ann. Cas. 1915B 89, 104 N. E. 666; *Fry v. Southern Pac. Co.*, 247 Ill. 564, 93 N. E. 906.

**Indiana.** *Chesapeake & O. Ry. Co. of Indiana v. Jordan*, — Ind. App. —, 114 N. E. 461; *Toledo, St. L. & W. R. Co. v. Milner*, — Ind. App. —, 110 N. E. 756; *Adams Exp. Co. v. Welborn*, 59 Ind. App. 330, 108 N. E. 163, 109 N. E. 420; *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839; *Wabash R. Co. v. Priddy*, 179 Ind. 483, 101 N. E. 724; *Pittsburgh, C., C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

**Iowa.** *Cedar Rapids Fuel Co. v. Illinois Cent. R. Co.*, — Iowa, —, 160 N. W. 353; *Baldwin & Riggs v. Chicago, R. I. & P. R. Co.*, 173 Iowa, 524, L. R. A. 1916D 335, 156 N. W. 17; *Heilman & Clark v. Chicago & N. W. R. Co.*, 167 Iowa, 313, 149 N. W. 436.

**Kansas.** *Miller v. Atchison, T. & S. F. R. Co.*, 97 Kan. 782, 156 Pac. 780; *Ray v. Missouri, K. & T. R. Co.*, 96 Kan. 8, L. R. A. 1916D 1046, 149 Pac. 397; *Christl v. Missouri Pac. R. Co.*, 92 Kan. 580, 141 N. W. 587; *Southern Nursery Co. v. Winfield Nursery Co.*, 89 Kan. 522, 132 Pac. 149.

**Kentucky.** *Adams Exp. Co. v. Cook*, 162 Ky. 592, 172 S. W. 1096; *Armstrong v. Illinois Cent. R.*



**Branch Lines.** Under the common law a carrier was

Co., 162 Ky. 539, 172 S. W. 947; Robinson v. Louisville & N. R. Co., 160 Ky. 235, 169 S. W. 831; Louisville & N. R. Co. v. Miller, 156 Ky. 677, 50 L. R. A. (N. S.) 819, 162 S. W. 73.

**Louisiana.** Burkenroad Goldsmith Co. v. Illinois Cent. R. Co., 138 La. 81, Ann. Cas. 1917C 935, 70 So. 44; National Rice Milling Co. v. New Orleans & N. E. R. Co., 132 La. 615, Ann. Cas. 1914D 1099, 61 So. 708.

**Maine.** Continental Paper Bag Co. v. Maine Cent. R. Co., — Me. —, 99 Atl. 259; Ross v. Maine Cent. R. Co., 112 Me. 63, 90 Atl. 711.

**Maryland.** Baltimore, C. & A. R. Co. v. William Sperber & Co., 117 Md. 595, 84 Atl. 72.

**Massachusetts.** Aradalou v. New York, N. H. & H. R. Co., 225 Mass. 235, 114 N. E. 297; Saxton Mills v. New York, N. H. & H. R. Co., 214 Mass. 383, 101 N. E. 1075.

**Michigan.** Harrison Granite Co. v. Grand Trunk R. R. System, 175 Mich. 144, 141 N. W. 642; Perket v. Manistee & N. E. R. Co., 175 Mich. 253, 141 N. W. 607.

**Minnesota.** Ford v. Chicago, R. I. & P. R. Co., 123 Minn. 87, 143 N. W. 249; Dodge v. Chicago, St. P., M. & O. R. Co., 111 Minn. 123, 126 N. W. 627.

**Mississippi.** Louisville & N. R. Co. v. Price, 111 Miss. 3, 71 So. 161; Southern Pac. R. Co. v. A. J. Lyon & Co., 107 Miss. 777, Ann. Cas. 1917D 171, 66 So. 509; American Exp. Co. v. Burke & McGuire, 104 Miss. 275, 61 So. 312; Jones v. Southern Exp. Co., 104 Miss. 126, 61 So. 165.

**Missouri.** Brockman Commission Co. v. Missouri Pac. R. Co., 195 Mo. App. 607, 188 S. W. 920;

Cudahy Packing Co. v. Atchison, T. & S. F. R. Co., 193 Mo. App. 572, 187 S. W. 149; Donoho v. Missouri Pac. R. Co., 193 Mo. App. 610, 187 S. W. 141; Bowles v. Quincy, O. & K. C. R. Co., — Mo. App. —, 187 S. W. 131; Conley v. Chicago, B. & Q. R. Co., 192 Mo. App. 534, 183 S. W. 1111; Ball v. Lusk, 189 Mo. App. 297, 175 S. W. 238; Bailey v. Missouri Pac. R. Co., 184 Mo. App. 457, 171 S. W. 44; Morrison Grain Co. v. Missouri Pac. R. Co., 182 Mo. App. 339, 170 S. W. 404; Hamilton v. Chicago & A. R. Co., 177 Mo. App. 145, 164 S. W. 248; Bledsoe v. Missouri, K. & T. R. Co., 177 Mo. App. 153, 164 S. W. 183; Johnson Grain Co. v. Chicago, B. & Q. R. Co., 177 Mo. App. 194, 164 S. W. 182; Sims v. Missouri Pac. R. Co., 177 Mo. App. 18, 163 S. W. 275; Joseph v. Chicago, B. & Q. R. Co., 175 Mo. App. 18, 157 S. W. 837.

**Nebraska.** Gilinsky v. Illinois Cent. R. Co., 98 Nebr. 858, 154 N. W. 730.

**New Hampshire.** Colby v. American Exp. Co., 77 N. H. 548, 94 Atl. 198.

**New Jersey.** Olivit Bros. v. Pennsylvania R. Co., 88 N. J. L. 241, 96 Atl. 582; Standard Combed Thread Co. v. Pennsylvania R. Co., 88 N. J. L. 257, L. R. A. 1913C 606, 95 Atl. 1002; Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379.

**New Mexico.** Atchison, T. & S. F. R. Co. v. Rodgers, 16 N. M. 120, 113 Pac. 905.

**New York.** Dodge & Dent Mfg. Co. v. Pennsylvania R. Co., 175 N. Y. App. Div. 823, 162 N. Y. Supp. 549; De Rochemont v. Boston & M. R. Co., 171 N. Y. App. Div. 262, 157 N. Y. Supp. 17; Fitch, Cornell & Co. v. Atchison, T. & S. F. R. Co.,



under no obligation to construct a switch connection

170 N. Y. App. Div. 222, 155 N. Y. Supp. 1073; Cheney Piano Action Co. v. New York Cent. & H. River R. Co., 166 N. Y. App. Div. 706, 152 N. Y. Supp. 285; Wien v. New York Cent. & River R. Co., 166 N. Y. App. Div. 766, 152 N. Y. Supp. 154; Davenport v. Chesapeake & O. R. Co., 87 N. Y. Misc. 303, 149 N. Y. Supp. 865; Ferrari v. New York Cent. & H. River R. Co., 162 N. Y. App. Div. 6, 147 N. Y. Supp. 376; Barstow v. New York, N. H. & H. R. Co., 158 N. Y. App. Div. 665, 143 N. Y. Supp. 983; United Lead Co. v. Lehigh Valley R. Co., 156 N. Y. App. Div. 525, 141 N. Y. Supp. 310; Shultz v. Skaneateles R. Co., 145 N. Y. App. Div. 906, 129 N. Y. Supp. 1146; Welch Lumber Co. v. Norfolk & W. R. Co., 137 N. Y. App. Div. 248, 121 N. Y. Supp. 985; De Winter & Co. v. Texas Cent. R. Co., 150 N. Y. App. Div. 612, 135 N. Y. Supp. 893.

**North Carolina.** Washington Horse Exch. v. Louisville & N. R. Co., 171 N. C. 65, 87 S. E. 941; Newborn & Co. v. Louisville & N. R. Co., 170 N. C. 205, 87 S. E. 37; Baldwin v. Atlantic Coast Line R. Co., 170 N. C. 12, 86 S. E. 776.

**North Dakota.** Knapp v. Minneapolis, St. P. & S. S. M. R. Co., 34 N. D. 466, 159 N. W. 81; Cook v. Northern Pac. R. Co., 32 N. D. 340, L. R. A. 1916D 345, 155 N. W. 867.

**Oklahoma.** St. Louis & S. F. R. Co. v. Akard, — Okla. —, 159 Pac. 344; St. Louis & S. F. R. Co. v. Wynn, — Okla. —, 156 Pac. 346; St. Louis & S. F. R. Co. v. Wood, — Okla. —, 152 Pac. 848; Missouri, O. & G. Ry. Co. v. French, — Okla. —, 152 Pac. 591; Chicago, R. I. & F. R. Co. v. Bruce, — Okla. —, 150 Pac.

880; St. Louis & S. F. R. Co. v. Mounts, 44 Okla. 359, 144 Pac. 1036; Chicago, R. I. & P. R. Co. v. Harrington, 44 Okla. 41, 143 Pac. 325; St. Louis & S. F. R. Co. v. Cox, Peery & Murray, 40 Okla. 258, 138 Pac. 144; St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 6 N. C. C. A. 717, 135 Pac. 406; Missouri, K. & T. R. Co. v. Walston, 37 Okla. 517, 133 Pac. 42.

**Oregon.** Grice v. Oregon-Washington R. & Nav. Co., 78 Or. 17, 150 Pac. 862, 152 Pac. 509; Zoller Hop Co. v. Southern Pac. Co., 72 Or. 262, 143 Pac. 931.

**Pennsylvania.** United States Horseshoe Co. v. American Exp. Co., 250 Pa. 527, 95 Atl. 706; Wright v. Adams Exp. Co., 230 Pa. 635, 79 Atl. 760.

**South Carolina.** Harman v. Southern Ry. Co., 106 S. C. 209, 90 S. E. 1023; De Loach v. Southern R. Co., 106 S. C. 155, 90 S. E. 701; Aldrich v. Atlantic Coast Line R. Co., 104 S. C. 364, 89 S. E. 315; Pinkussohn Cigar Co. v. Clyde S. S. Co., 101 S. C. 429, 85 S. E. 1060; Spence v. Southern Ry. Co., 101 S. C. 436; 85 S. E. 1058; Park v. Southern Ry. Co., 78 S. C. 302, 58 S. E. 931.

**South Dakota.** Elliott v. Chicago, M. & St. P. R. Co., 35 S. D. 57, 150 N. W. 777.

**Tennessee** Louisville & N. R. Co. v. Hobbs, 136 Tenn. 512, 190 S. W. 461; Rather & Co. v. Nashville, C. & St. L. R. Co., 131 Tenn. 289, 174 S. W. 1113; Drake v. Nashville, C. & St. L. R. Co., 125 Tenn. 627, 148 S. W. 214.

**Texas.** Chicago, R. I. & G. Ry. Co. v. Whaley, — Tex. Civ. App. —, 190 S. W. 833; Atchison, T. & S. F. Ry. Co. v. Smyth, — Tex. Civ. App. —, 189 S. W. 70; Kansas City, M. & O. Ry. Co. of

with a private siding.<sup>17</sup> But, under paragraph 2 of section 3 of the Act, the Commission had the power to order switch connections when the carrier's failure to do so constituted a discrimination against a particular shipper.<sup>18</sup> However, in the absence of discrimination, the Commission had no authority to compel a switch connection, with lateral branch lines or private sidings prior to the Hepburn Act of 1906 when the following amendment was made to Section 1 of the Act:<sup>19</sup> "Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability with-

**Texas v. Corn**, — Tex. Civ. App. —, 186 S. W. 807; **Pacific Exp. Co. v. Krower**, — Tex. Civ. App. —, 163 S. W. 9; **Galveston, H. & S. A. Ry. Co. v. Sparks**, — Tex. Civ. App. —, 162 S. W. 943; **Pacific Exp. Co. v. Ross**, — Tex. Civ. App. —, 154 S. W. 340; **Southern Pac. R. Co. v. W. T. Meadors & Co.**, 104 Tex. 469, 140 S. W. 427; **Houston & T. C. R. Co. v. Lewis**, 103 Tex. 452, 129 S. W. 594.  
**Washington. Henry v. Chicago, M. & P. 3. R. Co.**, 84 Wash. 633, 147 Pac. 425.

**West Virginia. Karr v. Baltimore & O. R. Co.**, 76 W. Va. 526, 86 S. E. 43.

**Wisconsin. Bichlmeir v. Minneapolis, St. P. & S. S. M. R. Co.**, 159

Wis. 404, 150 N. W. 508; **Best v. Great Northern R. Co.**, 159 Wis. 429, 150 N. W. 484; **Aton Piano Co. v. Chicago, M. & St. P. R. Co.**, 152 Wis. 156, 139 N. W. 743.

17. **Jones v. Newport News & M. V. Co.**, 13 C. C. A. 95, 65 Fed. 736.

18. **Butchers & Drovers' Stock-Yards Co. v. Louisville**, 14 C. C. A. 290, 67 Fed. 35; **Red Rock Fuel Co. v. Baltimore & O. R. Co.**, 11 I. C. C. 438.

19. The clauses in parentheses were inserted by amendment in 1910. See **Interstate Commerce Commission v. Delaware, L. & W. R. Co.**, 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415.

out discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper (or owner of such lateral, branch line of railroad), such shipper (or owner of such lateral, branch line of railroad) may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.”

Under this amendment it is the duty of an interstate carrier to make connections with a lateral branch railroad or a private side track (a) when such switch connection is reasonably practicable, (b) can be put in with safety, and (c) will furnish sufficient business to justify its construction and maintenance.<sup>20</sup>

**§ 71. Carriers Prohibited from Owning or Having an Interest in Freight Transported—the Commodity Clause.** In the enforcement of the provisions of the original act prohibiting discriminations and preferences by carriers against shippers, it became evident that the ownership of shipping corporations by carrying corporations was a source of favoritism and inequality that could not be prohibited under the statute as it then stood. Complete freedom from discriminations among shippers, it was discovered, could be secured

20. *United States v. Baltimore & O. S. W. R. Co.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5; *Winters Metallic Paint Co. v. Chicago, M. & St. P. R. Co.*, 16 I. C. C. 687; *McCormick v. Chicago, B. & Q. R.*

*Co.*, 14 I. C. C. 611; *Rahway Valley R. Co. v. Delaware, L. & W. R. Co.*, 14 I. C. C. 191; *Barden & Swartout v. Lehigh Valley R. Co.*, 12 I. C. C. 193.

only by a separation of the business of transportation from all other business. In the eastern coal fields many of the carriers owned collieries from which they mined coal and transported it in interstate commerce. Rival owners of mines suffered thereby and were frequently forced to sell their property at a sacrifice because of this dual ownership and the advantages thereby gained.

For many years previous to the passage of the Hepburn Act of 1906, there were constant demands by shippers for the enactment of a statute which would divorce transportation and production by restricting common carriers to a performance of their functions as such, and restrain them from entering into fields of mining and manufacturing, or in any other way becoming competitors with those to whom their services were offered and sold. Finally, in 1906, an amendment to section 1 of the Act, was adopted prohibiting a common carrier, subject to the statute, from transporting in interstate and foreign commerce, any article or commodity manufactured, mined or produced by it or under its authority, or which it owned in whole or in part, or in which it had an interest direct or indirect, except timber and the manufactured products thereof, and articles necessary and intended to be used in the conduct of its business as a common carrier. This amendment is known as the Commodity Clause and is a valid exercise of the power conferred upon Congress under the commerce clause of the Constitution.<sup>21</sup>

**§ 72. Amendments Authorizing Commission to Prescribe Through Routes and Joint Rates.** At common law the establishment and maintenance of through

21. *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, 35 Sup. Ct. 873; *Delaware, L. & W. R. Co. v. United States*, 231 U. S. 363, 58 L. Ed. 269, 34 Sup. Ct. 65; *United States v. Baltimore & O. R. Co.*, 231 U. S.

274, 58 L. Ed. 218, 34 Sup. Ct. 75; *United States v. Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. Ed. 458, 31 Sup. Ct. 387; *United States v. Delaware & H. Co.*, 213 U. S. 366, 53 L. Ed. 836, 29 Sup. Ct. 527.



routes and joint rates were purely matters of private contract between carriers.<sup>22</sup> Under the original Act to Regulate Commerce, it was provided by the second paragraph of Section 3 that the carriers should interchange traffic with one another; but the statute contained no provision by which the details of the interchange could be determined, and the courts held that, as at common law, the carriers had the right to determine for themselves what arrangements for through business should be entered into and upon what terms.<sup>23</sup>

Prior to the Hepburn Act of 1906 the carriers subject to the statute were, therefore, under no legal obligation to establish through routes or joint rates, and were at liberty to withdraw from such arrangements whenever they had been actually entered into. In its annual report for the year 1905 the Interstate Commerce

22. *Southern Pac. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330; *Central Stock Yards Co. v. Louisville & N. R. Co.*, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896; *Memphis & L. R. R. Co. v. Southern Exp. Co.*, 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; *Gulf, C. & S. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.*, 73 Fed. 438; *Little Rock & M. R. Co. v. St. Louis Southwestern Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, 26 L. R. A. 192; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. 400; *Patten v. Union Pac. Ry. Co.*, 29 Fed. 590; *Capehart v. Louisville & N. R. Co.*, 4 I. C. C. 265, 3 I. C. R. 268; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*,

3 I. C. C. 1, 2 I. C. R. 54; *Chicago & A. R. Co. v. Pennsylvania R. Co.*, I. C. C. 86, 1 I. C. R. 357.

23. *In re Lennon*, 166 U. S. 548, 41 L. Ed. 1110, 17 Sup. Ct. 658; *Allen & Lewis v. Oregon, R. & Nav. Co.*, 98 Fed. 16; *Gulf, Co. & S. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.*, 73 Fed. 438; *St. Louis Drayage Co. v. Louisville & N. R. Co.*, 65 Fed. 39; *Ex Parte Lennon*, 12 C. C. A. 134, 64 Fed. 320; *Little Rock & M. R. Co. v. St. Louis Southwestern Ry. Co.*, 11 C. C. A. 417, 63 Fed. 775, 26 L. R. A. 192; *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 9 C. C. A. 409, 61 Fed. 158; *Chicago & N. W. Ry. Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912; *Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

1 Control Carriers 12

Commission recommended to Congress an amendment authorizing it to order through routes and joint rates and to prescribe the division of such rates which the several carriers should receive.<sup>24</sup> Congress then in 1906

24. The reasons for the proposed amendment were thus stated in the report: "A considerable part of the interstate traffic transported by rail passes in transit over the lines of two or more independent roads. This traffic is generally handled by the connecting lines under some arrangement for the transaction of through business and usually upon a joint rate—that is to say, the carriers which transport the freight or carry the passenger agree upon a rate which shall be charged from the point of origin to destination, and also agree on the proportions in which this rate shall be divided among themselves. Section 3 of the act to regulate commerce attempts to secure this interchange of traffic by connecting railways and to prevent unjust discrimination by any carrier between its different connections. It has been held, however, both by the courts and by the Commission, that this part of the third section is not enforceable, because no means are provided for determining the conditions upon which traffic shall be interchanged and the proportions of the through rate which shall be received by the several carriers. It follows that connecting carriers are now under no legal obligation to establish through routes or joint rates and may at their pleasure withdraw from such arrangements when they have been actually entered into. It is evident also that if the Commission were to pronounce a joint rate unreasonable and order a re-

duction of that rate and the carriers parties to the rate should thereupon either cancel all joint arrangements or, as they might cancel their joint rates upon the commodity in question, the Commission might be practically powerless to enforce the reduced rate. When it is considered that a large part of the most important rates of this country are joint rates, it will be seen that the railways have it in their discretion by this means to largely defeat the purpose of the law, and that in order to prevent this the Commission should have authority to order railways to continue through routes and joint rates which are in effect and to prescribe the divisions which the several carriers shall receive in the distribution of those rates in case they fail to agree among themselves. This is a power which would seldom, if ever, be exercised; but its existence is necessary to prevent the occasion for its exercise. It should also be noted that discriminations against individuals and against particular species of traffic can be effected by the refusal of a carrier to establish a joint rate; and cases are now pending before the Commission involving discriminations of this character. The hearing of these cases has not yet been concluded, but if the allegations should be sustained it would seem that the effective way to correct the wrong would be by compelling the carrier to make a joint rate upon the traffic in question."

amended sections 1 and 15 of the Act by providing that it was the duty of carriers subject to the statute to establish through routes and just and reasonable rates applicable thereto and authorizing the Commission, after hearing on a complaint, to establish through routes and joint rates and to fix the terms and conditions under which those rates should be operated, as well as to prescribe the divisions of the rates. These amendments, however, contained a limitation upon the jurisdiction of the Commission which prescribed that no through routes could be established where a reasonable or satisfactory route already existed. The clause thus limiting the authority of the Commission prevented the establishment of additional through routes<sup>25</sup> and was stricken from the statute by the amendment of 1910.

The statute giving such authority to the Commission, as amended in 1910, is as follows: "The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transporta-

25. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 216 U. S. 531, 54 L. Ed. 605, 30 Sup. Ct. 415, in which the Court

held that the existence of another route might be inquired into by the courts.



tion by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

**§ 73. Commission Authorized to Determine Allowances to Shippers for Services Rendered in Connection with Transportation.** Both before and since the enactment of the original Act to Regulate Commerce, shippers have frequently, by agreement with carriers, performed a part of the transportation service for which the carriers make an allowance to the shippers. This practice, as such, has never been condemned by Congress or by the Commission for there are many cases in which the service can be rendered or the facility furnished more advantageously to the shipper, carrier and the public by the shipper himself;<sup>26</sup> but such allowances have been the means of creating unjust discriminations and preferences to shippers by the payment of

26. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291; *United States v. Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315; *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; *Cudahy Packing Co. v. Grand Trunk Western R. Co.*, 131 C. C. A. 401, 215 Fed. 93; *Atchison, T. & S. F. Ry. Co. v. United States*, 204 Fed. 647; *Knudsen-Ferguson Fruit Co. v. Chicago, St. P., M. & O. R. Co.*, 79 C. C. A. 483, 149 Fed. 973; *Best Co. v. Atchison, T. & S. F. Ry. Co.*, 33 I. C. C. 1; *Inman, Akers & Inman v. Atlantic C. L. R. Co.*, 32 I. C. C. 146; *Tap Line Case*, 31 I. C. C. 490; *Schultz-Hansen Co. v. Southern P. Co.*, 18 I. C. C. 234; *National Wholesale Lumber Dealers' Ass'n. v. Atlantic C. L. R. Co.*, 14 I. C. C. 154.



extravagant sums out of all proportion to the value of the service rendered. Unreasonable sums have been frequently allowed when the shipper was the owner of one of the facilities of transportation, or performed any part of the transfer service.<sup>27</sup> Such preferences sometimes took the form of an excessive division to a terminal railroad owned by the shipper; the payment of an excessive elevator charge to the owner of grain, or the allowance of excessive mileage on a private car which conveyed the property of the owner of the car.

Prior to 1906, one of the evils most bitterly complained of by shippers in this regard was the refrigeration charges collected by companies which furnished refrigerator cars to railroad companies. Following an investigation by the Commission into the workings of the Armour Car Lines, Congress passed as a part of the Hepburn Act of 1906 a provision in the form of an amendment to Section 15 of the Act which, with the addition of the phrase "on its own initiative" after the word "or," passed in 1910, is as follows: "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

**§ 74. Amendment of 1906 Prohibiting the Issuance and Giving of Free Passes—Persons Excepted.** Section 22 of the original Act as amended in 1889 and 1895

27. *United States v. Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75; *Southern Pac.*

*Co. v. Interstate Commerce Commission*, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. 288.

provided that nothing in the statute should prevent transportation of certain property named therein and certain persons free or for reduced rates and fares: but the Act contained no express provisions prohibiting the issuance and giving of free transportation to passengers. One of the amendments passed as a part of the Hepburn Act of 1906 expressly prohibited all carriers subject to the Act from giving directly or indirectly any interstate free ticket, free pass or free transportation to passengers except to certain employes and other persons specifically mentioned in the amendment. This anti-pass provision was amended in 1908 by the addition of a proviso defining the terms "employes and families," and in 1910 the term "families" was further extended so as to include widows during widowhood and minor children during minority, of persons who died while in the service of a common carrier.

Following a decision of the Supreme Court<sup>28</sup> holding that the anti-pass provision was exclusive and that express companies could not issue franks to their employes or the employes of other carriers, this section was further amended in 1910 by the insertion of a proviso declaring that nothing in the Act should be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employes and their families, of telephone, telegraph and cable lines, and the officers, agents and employes and their families of other carriers subject to the Act. As passed in 1906 this provision excepted boards of managers of soldiers' and sailors' homes from the provisions prohibiting free passes, but this clause was eliminated in 1908. The list of persons given in this amendment who may receive free transportation, is exclusive.<sup>29</sup>

28. *American Exp. Co. v. United States*, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315.

29. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A.

(N. S.) 671; *American Exp. Co. v. United States*, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315. But carriers may exchange passes with common carriers not subject to the Act. *United States v. Erie R.*

With the amendments herein indicated, the anti-pass provision now reads as follows: "No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law: to ministers of religion, traveling secretaries of railroad Young Men's Christian Association, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes of State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary care takers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the

Co., 236 U. S. 259, 59 L. Ed. 567, 35 Sup. Ct. 396.

30. Stipulations in free passes given to persons entitled to receive them under the statute and providing that the carrier shall be exempt from liability for injuries due to negligence, are valid. *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. Ed. 1476, 34 Sup. Ct. 964; *Boering v. Chesapeake Beach R. Co.*, 193 U. S.

442, 48 L. Ed. 742, 24 Sup. Ct. 515; *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. 408; *Tripp v. Michigan Cent. R. Co.*, 151 C. C. A. 385, 238 Fed. 449. But a caretaker of live stock is a passenger for hire and a stipulation exempting the carrier from liability is invalid. *Norfolk Southern R. Co. v. Chatman*, 244 U. S. 276, 61 L. Ed. 1131, 37 Sup. Ct. 499, L. R. A. 1917F 1128.

interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of that Act: Provided, further, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority or persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof."



§ 75. **Forms of All Accounts, Records, and Memoranda Kept by Interstate Carriers Placed under Jurisdiction of Commission.**.. Section 20 of the statute was extensively amended by the Hepburn Act of 1906. While the original act required the filing of annual reports by interstate carriers with the Commission, no adequate means were provided for the effective enforcement of that duty.<sup>31</sup> Nor were the officers of the carriers required to certify under oath to the correctness of their returns.

One of the amendments of 1906 provided that if any carrier subject to the act should fail to make and file its annual report within the time fixed by the Commission, or should fail to make specific answers to any question authorized by the law, within thirty days from the time it was required to do so, such carrier should forfeit to the United States the sum of \$100 for each day's violation. As further amended in 1910, this section, under the same penalty, authorized the Commission to require monthly, periodical or special reports concerning any matter about which the Commission was authorized to inquire. All reports were required to be made out under oath. The Commission was also in 1906 given the authority to prescribe the forms of all records, accounts, and memoranda kept by the carriers including all records of the movement of traffic as well as the receipts and expenditures of money. The Commission was authorized to have access to all accounts, records and memoranda kept by the carriers and to employ special agents or examiners to inspect and examine the same. The amendment further declared it to be unlawful for any carrier to keep any other accounts, records or memoranda than those prescribed or approved by the Commission.

A failure or refusal on the part of any carrier to keep its accounts, records, and memoranda on the books

31. *Knapp v. Lake Shore & M. S. R. Co.*, 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538.

and in the manner prescribed by the Commission or to submit such records to the inspection of the Commission or its authorized agents, subject the carrier to a forfeiture of the sum of \$500 for each offense and for each day's continuance of the offense. The statute further declared it to be a crime for any person to wilfully make a false entry in such records or to wilfully destroy or falsify any such records, or to wilfully neglect to make true and correct entries therein, or to keep any other accounts, records or memoranda than those prescribed or approved by the Commission. The Commission was also authorized to issue orders prescribing the length of time that all records should be preserved and to specify what papers might, after a reasonable time, be destroyed. Any examiner who divulges any fact which comes to his knowledge during the course of his examination of the records of the carrier, except as directed by the Commission or a court or judge thereof, is guilty of a felony. The district courts of the United States are authorized upon a failure to comply with any of the foregoing provisions to issue a writ of mandamus requiring the carrier to comply with the act.<sup>32</sup>

The broad powers given to the Commission to secure a uniform system of accounts by all carriers subject to the act under the provisions of Section 20 as amended in 1906 and 1910 have been sustained by the national Supreme Court;<sup>33</sup> but the statute as amended does not authorize the Commission to inspect the correspondence of a carrier between its various officers and agents.<sup>34</sup>

32. This provision was passed to remedy the defect pointed out in *Knapp v. Lake Shore & M. S. R. Co.*, 197 U. S. 536, 49 L. Ed. 870, 25 Sup. Ct. 538.

33. *Kansas City S. R. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125, 52 L. R. A. (N. S.) 1; *Interstate Commerce Commission v. Goodrich Transit*

*Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621. See also in *re Separation of Operating Expenses*, 30 I. C. C. 676.

34. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 Sup. Ct. 363.

§ 76. **Amendments and Additions to the Statute by the Mann-Elkins Act of 1910.** The substantive provisions of the Interstate Commerce Act were further enlarged by an act passed on June 18, 1910, commonly known as the Mann-Elkins Law.<sup>35</sup> Briefly this amendatory statute corrected numerous defects in the law, conferred upon the shipping public new rights and remedies and correspondingly increased the jurisdiction and authority of the Commission. It provided for the establishment of a commerce court composed of five circuit judges with jurisdiction formerly given to the circuit courts over cases involving the enforcement of the orders of the Commission, except those for the payment of money. This court was created for the purpose of securing prompt decisions on questions of law involving interstate transportation, but the rulings of the court did not seem to please the populace, and the court was abolished by an act of Congress approved October 22, 1913.<sup>36</sup> Telegraph, telephone, and cable companies, wire and wireless, engaged in sending messages from one state to another and to foreign countries, were, by this amendment, placed under federal control.<sup>37</sup>

Carriers were also required to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes. Section 1 as amended in 1910 further declared it to be the duty of all carriers, subject to the Act, to establish and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices might be made, and just and reasonable regulations and practices affecting classifications, rates or tariffs; the issuance, form and substance of tickets, receipts and bills of lading; the manner, and method of presenting, marketing, packing and delivering property for transportation; the facilities for transportation; the carrying of personal, sample and excess baggage, and all

35. 36 Stat. at L. 539.

37. Section 108, *infra*.

36. 38 Stat. at L. 219.

other matters relating to or connected with the receiving, handling, transporting, storing, and delivering of property subject to the provisions of the statute which might be necessary or proper to secure the safe and prompt receipt, handling, transportation and delivery of property upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice with reference to interstate and foreign commerce, was declared to be unlawful. Section 6 of the Act was further amended by empowering the Commission to reject any schedule tendered for filing that did not provide a lawful notice of its effective date. A penalty of \$250 payable to the United States, was provided for the failure of any common carrier after a written request, to furnish a written statement of a rate or charge applicable to a described shipment between stated places under schedule of tariff to which the carrier is a party, provided, however, the person making such request suffers damage by reason of such refusal, or in consequence of the misstatement of a rate either through making the shipment over the line or route for which the property rate is higher than the rate over another available line or route, or through entering into any sale or contract whereby such person obligates himself to make such shipment at his own cost. A failure on the part of any carrier to comply with the terms of any regulation of the Commission under the provisions of section 6 subjected the carrier to a penalty of \$500 for each offense and \$25 for each day's continuance of the offense.

The Act as written prior to 1910 provided in Section 13 that the Commission might institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made. This clause was enlarged by giving the Commission full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before the Commission by any provision of the Act, or concerning which any question might arise under



any of the provisions of the Act, or relating to the enforcement of any of the provisions of the Act. Section 15 was amended by giving a shipper the right to designate in writing by which of two established through routes his property should be transported.

An amendment to Section 15 also declared it to be a misdemeanor for any common carrier or any agent thereof to knowingly disclose or permit any person other than the shipper to be informed concerning the nature and character of property transported which information might be used to the detriment or prejudice of the shipper or which might improperly disclose his business transaction to a competitor. If a carrier does not comply with an order of the Commission for the payment of money, the complainant may file suit, pursuant to an amendment passed in 1910, in any state court of competent jurisdiction as well as in the federal court. Other amendments passed in 1910 are noted in the following paragraphs.

**§ 77. Fraudulent Claims for Loss and Damage by Shippers Against Carriers Penalized.** By an amendment in 1910 to section 10 of the Act, false and fraudulent claims for damages in connection with interstate shipments by any person, corporation or company, or any agent thereof, delivering property for transportation or for whom any carrier shall transport property, whereby the compensation of the carrier shall be made less than the regular rates, is declared to be a crime.

The purpose of this enactment was to stamp out a practice among some shippers of knowingly presenting and obtaining damages through false and exaggerated claims for loss or injury to property transported. The amendment reads as follows: "Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, \* \* \* who shall knowingly and wilfully, directly or indirectly, himself or by employee,

agent, officer, or otherwise, by false statement or representation as to cost, value, nature, or extent of injury, or by the use of any false bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to be false, fictitious, or fraudulent, or to contain any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, refund, or payment for damage or otherwise in connection with or growing out of the transportation of or agreement to transport such property, whether with or without the consent or connivance of the carrier, whereby the compensation of such carrier for such transportation, either before or after payment, shall in fact be made less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court: Provided, That the penalty of imprisonment shall not apply to artificial persons."

**§ 78. Power Conferred Upon Commission by 1910 Amendment to Suspend Proposed Changes in Rates.** Unquestionably the most important and far reaching of the amendments passed in 1910 is the provision added to section 15 of the Act giving the Commission the power to suspend schedules of rates filed with it. Authority is given the Commission, either upon complaint or upon its own initiative without complaint, at once and without answers or other formal pleading by the interested carrier but upon reasonable notice, to enter upon a hearing concerning the propriety of the proposed changes in any schedule filed; and pending such hearing and decision, the Commission, upon filing with such schedule and delivering to the carrier affected a statement of its

reasons, may suspend the privilege of any such schedule for a period not longer than 120 days beyond the limit the schedule would otherwise go into effect. If the hearing is not concluded within the period of suspension, the Commission may extend the time of suspension for a further period of six months when the proposed schedule, if not acted upon, automatically goes into effect. After hearing, whether completed before or after the schedule goes into effect, the Commission is authorized to make such order in reference to the schedule as would be proper in a proceeding started after the schedule had become effective.

The amendment further provides that at any hearing involving a rate increased after the passage of the Act of 1910, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable, shall be upon the common carrier. Preference over all other questions pending before it shall be given by the Commission to the hearing and decision of such questions. The purpose of Congress in authorizing the Commission to suspend proposed schedules resulted from a recognition that adequate protection for the shipper could be given only through suspension of a rate until the reasonableness of the proposed change had been determined.

**§ 79. The 1910 Amendment to the Long and Short Haul Provision.** Among the provisions of the statute amended by the Mann-Elkins Act of 1910 was section 4 prohibiting carriers from charging more for a shorter distance than for a longer distance over the same line in the same direction under substantially similar circumstances and conditions. Four changes were made in this section. The clause "under substantially similar circumstances and conditions" was eliminated. The effect of this change was to take from the carriers the right previously lodged in them to decide primarily whether the circumstances and conditions were so dissimilar as to justify a greater charge for the shorter than for the longer haul, and to transfer that primary

power to the Commission.<sup>38</sup> The prohibition was also amended so as to cover "routes" as well as "lines." The third change in the section was the statutory adoption of a rule theretofore enforced by the Commission prohibiting a greater charge for a through route than the sum of the locals subject to the provisions of the Act.

An additional section provides that whenever a carrier by railroad in competition with a water route reduces the rates to or from competitive points, such rates shall not be increased thereafter without the consent of the Interstate Commerce Commission and unless that body finds the proposed increase rests upon other conditions than the elimination of water competition. The following is now the form of the fourth section: "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Interstate Commerce Commission such common carrier may, in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided, further, That no rates or charges law-

38. *United States v. Atchison, T. & S. F. R. Co.*, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986.



fully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission. Whenever a carrier by railroad shall be in competition with a water route or routes reduces the rates on the carriage of any species of freight, to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

**§ 80. Statutory Duty of Carriers to Route Interstate Freight as Directed by Shippers.** Another important amendment included in the Mann-Elkins Act of 1910 was an addition to section 15 of the Act to Regulate Commerce which provides that in all cases where, at the time of delivery of property to any common carrier by railroad, for transportation subject to the provisions of the act, to any point of destination, between which and the point of such delivery for shipment, two or more through routes and through rates shall have been established as provided in the act, to which through rates and through routes such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination.

This amendment further provides that it shall thereupon be the duty of the initial carrier to route such property and issue a through bill of lading therefor as so directed, and to transport such property over its own line or lines and deliver the same to a connecting line or lines according to such through route. The connect-

ing carriers must also receive such property and transport it over their lines and deliver the same to the next succeeding carrier or consignee according to such routing instructions in the bill of lading. A shipper is given the right under this amendment to determine, when competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route, his freight shall be transported.

**§ 81. Carriers and Their Agents Prohibited from Giving Information Relating to Business of Interstate Shippers.** One of the amendments of 1910 to section 15 of the Act prescribes that it shall be unlawful for any common carrier subject to the provisions of the act, or any officer, agent or employe of such carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person, or corporation, other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or route of any property tendered or delivered to such carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor.

The amendment further provides that it shall be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used. A proviso to the amendment prescribes that nothing in the act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any state or federal court, or to any officer or agent of the government of the United States, or of any state or territory, in the exercise of its powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime; or informa-

tion given by a common carrier to another carrier or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers. Any person, corporation or association violating any of the foregoing provisions shall be deemed guilty of a misdemeanor, and, for each offense, on conviction, is required to pay to the United States a penalty of not more than \$10,000.

**§ 82. Extension of Jurisdiction of Commission over Water Carriers by Panama Canal Act of 1912.** The Panama Canal Act of 1912 extended the scope of the statute and gave additional authority to the Interstate Commerce Commission over water carriers by amending sections 5 and 6 of the Act to Regulate Commerce. These amendments are elsewhere explained.<sup>39</sup>

**§ 83. Act of 1913 Requiring Commission to Ascertain Valuation of Property Owned or Used by all Interstate Carriers.** A stupendous task was placed upon the Interstate Commerce Commission by the statute known as the Valuation Act of 1913.<sup>40</sup> For the purpose of securing a complete and accurate inventory and valuation of the property of common carriers engaged in interstate and foreign commerce, this law, passed in the form of an amendment to Section 19, requires the Commission to ascertain and report the value of all the property owned or used by every common carrier subject to the provisions of the Act.

The Commission is required to make an inventory of the property of each carrier and show the value thereof and to classify the physical property as nearly as practicable in conformity with the classification of expenditures for road and equipment as prescribed by the Commission. The Commission must further ascertain and report as to each piece of property owned or used by each carrier for its purposes as a common carrier together with the original cost to date, the cost of repro-

39. Sections 95, 96 and 97, *infra*

40. Appendix, A, *infra*.

duction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained with the reasons for their differences, if any.

The Act further requires the Commission to ascertain and report separately other values, and elements of value, if any, of the property of each carrier, and an analysis of the methods of valuation employed and of the reasons for any differences between any such values and each of the foregoing cost values. The report of the Commission must also include in detail and separately from improvements, the original cost of all lands, rights of way and terminals owned or used for the purposes of the common carriers, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost, of condemnation and damages or of purchase in excess of such original cost or present value. Such investigation and report is required also to show separately the property held for purposes other than those of the common carrier, and the original cost and present value of the same together with an analysis of the methods of valuation employed. In ascertaining the original cost of the property of each carrier, the Commission, in addition to such other elements as it may deem necessary, is required to investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expenses thereof; upon the net and gross earnings of such corporation and shall report also in detail upon the expenditure of all moneys and for the purposes for which the same were expended. The Commission is also required to ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any



previous corporation operating such property, or by the Government of the United States or by any state, county, municipal government, or by individuals, associations or corporations. An elaborate system of procedure is then provided in the amendment for the ascertainment of the valuation of the properties of the carriers.

**§ 84. Amendment of 1917 Penalizing Persons for Obstructing Movement of Interstate Commerce During War.**

An amendment to section 1 of the Act, enacted on August 10, 1917, declares it to be a crime for any person, during the war, to knowingly and willfully retard or obstruct the orderly conduct or movement of interstate and foreign commerce.<sup>4</sup> This amendment provides: "That on and after the approval of this Act any person or persons who shall, during the war in which the United States is now engaged, knowingly and willfully, by physical force or intimidation, by threats of physical force, obstruct or retard, or aid in obstructing or retarding, the orderly conduct or movement in the United States of interstate or foreign commerce, or the orderly make-up or movement or disposition of any train, or the movement or disposition of any locomotive, car, or other vehicle on any railroad or elsewhere in the United States engaged in interstate or foreign commerce shall be deemed guilty of a misdemeanor, and for every such offense shall be punishable by a fine of not exceeding \$100 or by imprisonment for not exceeding six months, or by both such fine and imprisonment; and the President of the United States is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of the passage of the mail, or of the orderly conduct or movement of interstate or foreign commerce in any part of the United States, or of any train, locomotive, car, or other vehicle upon any railroad or elsewhere in the United States engaged in interstate or foreign commerce: Provided, That nothing in this section shall be construed to repeal, modify, or affect either section six or section twenty of an Act

entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October fifteenth, nineteen hundred and fourteen."

**§ 85. President Authorized During War to Direct Movement of Commodities Essential to National Defense.**

The amendatory act referred to in the foregoing paragraph further provides as follows: "That during the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is hereby authorized to issue orders direct, or through such person or persons as he may designate for the purpose or through the Interstate Commerce Commission. Officials of the United States, when so designated, shall receive no compensation for their services rendered hereunder. Persons not in the employ of the United States so designated shall receive such compensation as the President may fix. Suitable offices may be rented and all necessary expenses, including compensation of persons so designated, shall be paid as directed by the President out of funds which may have been or may be provided to meet expenditures for the national security and defense. The common carriers subject to the Act to regulate commerce or as many of them as desire so to do are hereby authorized without responsibility or liability on the part of the United States, financial or otherwise, to establish and maintain in the city of Washington during the period of the war an agency empowered by such carriers as join in the arrangement to receive on behalf of them all notice and service of such orders and direc-

tions as may be issued in accordance with this Act, and service upon such agency shall be good service as to all the carriers joining in the establishment thereof. And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad or water or otherwise to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatever is necessary to the prompt execution of such order, shall render such officers, agents, or employees guilty of a misdemeanor, and any such officers, agents, or employee shall, upon conviction, be fined not more than \$5,000, or imprisoned not more than one year, or both, in the discretion of the court. For the transportation of persons or property in carrying out the orders and directions of the President, just and reasonable rates shall be fixed by the Interstate Commerce Commission; and if the transportation be for the Government of the United States, it shall be paid for currently or monthly by the Secretary of the Treasury out of any funds not otherwise appropriated. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal pains, penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction."

## CHAPTER VI

### COMMON CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT.

- Sec. 86. The Statutory Provision.
- Sec. 87. Who are Common Carriers Within the Meaning of the Interstate Commerce Act.
- Sec. 88. Distinction Between Common Carriers and Plant Facilities—Industrial Railways.
- Sec. 89. All Carriers in Territories, District of Columbia and Alaska Included.
- Sec. 90. When Railroads Wholly Within Limits of Single State are Under Federal Control—Former and Present Rule.
- Sec. 91. Carriers Engaged in Transportation Between Points in United States and Adjacent Foreign Countries.
- Sec. 92. Carriers by Water Included as to Continuous Shipments Under Common Arrangements with Carriers by Rail.
- Sec. 93. Independent Ferry Companies Included as to Shipments Under Common Arrangement with Rail Carriers.
- Sec. 94. Common Control, Management, and Arrangement for Continuous Transportation, Defined and Explained.
- Sec. 95. Extension of Federal Jurisdiction Over Water Carriers by Panama Canal Act of 1912.
- Sec. 96. Amendment Applies to Traffic Between Two Points in United States Passing Through Panama Canal "or Otherwise."
- Sec. 97. Control or Ownership of Competitive Water Line by Rail Carrier Subject to Approval of Commission.
- Sec. 98. Policy of Congress in Adoption of That Part of Panama Canal Act Forbidding Ownership of Water Lines by Railroads.
- Sec. 99. Bridges and Bridge Companies Subject to Federal Act, When.
- Sec. 100. Street Railroads Crossing State Lines not Subject to Interstate Commerce Act.
- Sec. 101. Electric Interurban Railroads Engaged in Interstate Commerce Controlled by Statute.
- Sec. 102. Status of Terminal Railroads and Belt Lines Participating in Movement of Interstate Traffic.
- Sec. 103. Stock Yards Company Transferring Livestock Between its Pens and Tracks of Trunk Lines, a Common Carrier.
- Sec. 104. Status of Logging Roads as Interstate Carriers—the Tap Line Cases.
- Sec. 105. Private Car Lines not Common Carriers within Meaning of Act to Regulate Commerce.
- Sec. 106. Common Carriers of Oil and Other Commodities by Pipe Line Included.
- Sec. 107. Pipe Line Companies Transporting Solely Their Own Oil Common Carriers, When.



- Sec. 108. Assumption of National Control over Interstate and Foreign Cable, Telephone and Telegraph Companies.
- Sec. 109. Independent Express Companies Included by Hepburn Amendment of 1906.
- Sec. 110. Sleeping Car Companies Placed Under Jurisdiction of Commission by Hepburn Act of 1906.
- Sec. 111. Receivers and Purchasers Pendente Lite.
- Sec. 112. Railroad Companies Incorporated in Foreign Countries and Engaged in Interstate Commerce.
- Sec. 113. Statute Applies to Individuals and Partnerships as Well as Incorporated Companies.

**§ 86. The Statutory Provision.** The Act to regulate commerce prescribes that its provisions shall apply to any corporation or any persons engaged in the transportation of oil or other commodity, except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from a State, Territory, or District of the United States, to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of the Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. The statute further provides that the term

“common carrier” as used in the Act, shall include express companies and sleeping car companies.<sup>1</sup>

**§ 87. Who are Common Carriers Within the Meaning of the Interstate Commerce Act.** The statute applies to any person or corporation engaged in the transportation of persons or property solely by railroad, or partly by railroad and partly by water, as a “common carrier.” The act does not define the term “common carrier” in so far as it relates to water and rail lines. Its meaning, therefore, must be ascertained by its common law use and application.<sup>2</sup> Under the common law, a common carrier is a person who undertakes to transport for hire from one place to another, passengers or the goods of those who choose to employ him.<sup>3</sup> Incorporation is not a prerequisite to the exercise of the functions of a common carrier by rail.<sup>4</sup>

1. Section 1 of the Act to Regulate Commerce, Appendix A, *infra*.

2. *Manufacturers Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 21 I. C. C. 304; *Crane Iron Works v. Central R. of New Jersey*, 17 I. C. C. 514; *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 17 I. C. C. 338; *Solvay Process Co. v. Delaware, L. & W. R. Co.*, 14 I. C. C. 246; *General Elec. Co. v. New York Cent. & H. River R. Co.*, 14 I. C. C. 237.

3. *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; *Nordgard v. Marysville & N. R. Co.*, 134 C. C. A. 415, 218 Fed. 737; *Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717; *United States v. St. Joseph Stockyards Co.*, 181 Fed. 625; *Union Stockyards Co. of Omaha v. United States*, 94 C. C. A. 626, 169 Fed. 404. “To bring a person,

therefore, within the description of a common carrier the following characteristics must appear: 1. He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation.

2. He must undertake to carry goods of the kind to which his business is confined. 3. He must undertake to carry by the methods by which his business is conducted and over his established road. 4. The transportation must be for hire. 5. An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms.” —*Hutchinson on Carriers*, 3d ed. Vol. 1, Sec. 48, p. 42.

4. *Truckers Transfer Co. v. Charleston & W. C. Ry. Co.*, 27 I. C. C. 275; *In re Wool, Hide & Pelt Rates*, 23 I. C. C. 151.

If a company holds itself out to the public as a common carrier for hire and invites the public to accept its service, it is a common carrier notwithstanding the fact that a considerable portion of its business consists in transporting its own property, or property of an industry with which it is associated.<sup>5</sup> The extent to which a railroad is used by the public does not determine whether it is a common carrier, but it is the right of the public to use its facilities and to demand service of it that determines its status as a common carrier.<sup>6</sup> Neither is its status as a carrier determined by its length.<sup>7</sup>

The fact that freight transported by a carrier is confined principally to one commodity does not deprive it of its status as a common carrier, because the carrier may limit the kind and character of traffic it wishes to transport.<sup>8</sup> When the status of a railroad is fixed as a common carrier it owes a duty to the public at large and not merely to those who have been accustomed to patronize it.<sup>9</sup> No other duties may be required of a person under the Act nor rights thereunder be accorded unless the person is a common carrier.<sup>10</sup>

**§ 88. Distinction Between Common Carriers and Plant Facilities—Industrial Railways.** Large industrial establishments throughout the country, and especially iron and steel industries, frequently own and operate plant railways in connection with their manufacturing departments. These systems of rails and locomotives

5. *Decatur Nav. Co. v. Louisville & N. R. Co.*, 31 I. C. C. 281. See also *Manufacturers Ry. Co. v. United States*, — U. S. —, 62 L. Ed. —, 38 Sup. Ct. 383, decided April 15, 1918.

6. *United States v. Butler County R. Co.*, 234 U. S. 29, 58 L. Ed. 1196, 34 Sup. Ct. 748; *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 841; *Curry & Whyte Co. v. Duluth & I. R. R. Co.*, 32 I. C. C. 162; *In re Advances Joint Class & Commodity Rates v. Birm-*

*ingham S. R. Co.*, 32 I. C. C. 110; *Crane R. Co. v. Central R. Co. of New Jersey*, 248 Pa. 333, 93 Atl. 1076.

7. *Second Industrial Railways Case*, 34 I. C. C. 596.

8. *Flour City Milling Co. v. Lehigh Valley R. Co.*, 24 I. C. C. 179.

9. *In re Mine Ratings*, 25 I. C. C. 286.

10. *In re Joint Rate Cancellation*, 27 I. C. C. 353.

and cars used thereon in and about these plants are necessary facilities of the industries. The tracks are used not only for the movement of cars between the rails of the line carriers and the various points within the plant, but they are required also for the prompt and economical movement of material between the various departments of the plant.

Formerly these railways were operated as a department or bureau of the industrial company, but in recent years, many of them have been operated through the means of an incorporated railroad owned by the industry for the purpose mainly of assuming the characteristics of a common carrier. When the plant tracks were thus taken over by an incorporated railroad, the tracks of the latter were frequently extended around the plant in such a manner as to exclude the trunk lines from every section of the plant except over the rails of the newly incorporated industrial railroad. The result was an apparent intermediate service by the industrial railroad between the plant and the line carrier, on the basis of which the plant railroad exacted compensation, not from the industry, but out of the rate of the line carrier. After turning over to the subsidiary railroad company the plant track and locomotives, the industrial railroad company then claimed to be a common carrier and entitled to a division of the rates of the trunk lines.

In the first Industrial Railways Case<sup>11</sup> the Commission held that all allowances to, or divisions of rates with, any of these industrial railroads were unlawful because they were plant facilities and not common carriers with rights and obligations as such. But following the decision of the United States Supreme Court in the Tap Line Cases involving the status of short logging roads,<sup>12</sup> the Commission modified its original report in conformity with the principles of that case.<sup>13</sup> The

11. 29 I. C. C. 212.

12. See Section 87, *supra*.

13. Second Industrial Railways Case, 34 I. C. C. 596; Industrial



trunk lines were then permitted to arrange with the industrial railroads which were common carriers under the test applied by the Supreme Court in the Tap Line Cases, and which performed a service of transportation, for a reasonable compensation for such service in the form of switching charges or a division of the joint through rates.<sup>14</sup>

**§ 89. All Carriers in Territories, District of Columbia and Alaska Included.** The statute prescribes that all common carriers of persons or property by rail, and by water and rail when used under a common management, from one state or territory or the District of Columbia to any other state, territory or District of Columbia, or from one place to another in the same territory, shall be amenable to all its provisions. The constitutional limitation upon the power of Congress over the states is not applicable to territories and the District of Columbia, for its jurisdiction over them is full and complete.<sup>15</sup>

The national constitution provides that the Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.<sup>16</sup> The Constitution also provides that Congress shall have the power to exercise legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and

Railways Case, 32 I. C. C. 129. See also *Manufacturers Ry. Co. v. United States*, — U. S. —, 62 L. Ed. —, 38 Sup. Ct. 383, decided April 15, 1918.

14. See also *Adams Stave Co. v. Texas, O. & E. R. Co.*, 38 I. C. C. 203; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 38 I. C. C. 40; *Chicago West Pullman v. Southern R. Co.*, 37 I. C. C. 408; *East Jersey R. & T. Co. v. Central R. of New Jersey*, 36 I. C. C. 146; *Tap Line Case*, 35 I. C. C. 485;

*Industrial Railways Case*, 32 I. C. C. 129; *In re Joint Rates with Birmingham S. R. Co.*, 32 I. C. C. 110; *Manufacturers' Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 32 I. C. C. 100.

15. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21; *Late Corporation of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 1, 34 L. Ed. 478, 10 Sup. Ct. 792.

16. Article 4, Section 3.

the acceptance of Congress, become the seat of government.<sup>17</sup> The District of Columbia was acquired by the national Government pursuant to the authority given in this constitutional provision from the states of Virginia and Maryland in 1789. The jurisdiction of Congress over the District of Columbia is exclusive.<sup>18</sup>

The Interstate Commerce Commission held that Alaska was not a territory within the meaning of the Interstate Commerce Act and that, therefore, it had no jurisdiction of the complaint of a steamship company against a railroad operated in Alaska.<sup>19</sup> But on writ of error to the United States Supreme Court from the Court of Appeals of the District of Columbia, it was held that Alaska was a territory within the meaning of the statute and that the authority of the Secretary of Interior to revise and modify railway rates in Alaska under a former statute, was repealed by the Interstate Commerce Act.<sup>20</sup> Prior to the amendment of 1906 to the Interstate Commerce Act, the Commission had no jurisdiction to regulate rates on shipments between points wholly within a territory.<sup>21</sup>

**§ 90. When Railroads Wholly Within Limits of Single State are Under Federal Control—Former and Present Rule.** Prior to the Hepburn Amendment of 1906 a common carrier by rail whose lines were confined within the limits of a single state, was not subject to the provisions of the Act to Regulate Commerce or the control of the Interstate Commerce Commission unless it entered into a common arrangement, management or control with another carrier by rail for a continuous carriage or shipment from one state to another; for the

17. Article 1, Section 8.

18. *Howard v. Illinois Cent. R. Co.*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141; *Cohens v. Virginia*, 6 Wheat (U. S.), 264, 5 L. Ed. 257.

19. *In re Jurisdiction in Alaska*, 19 I. C. C. 81.

20. *Interstate Commerce Com-*

*mission v. United States ex rel. Humboldt S. S. Co.*, 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. 556. See also *Humboldt Steamship Co. v. White Pass & Yukon Route*, 25 I. C. C. 136.

21. *Ft. Smith & W. R. Co. v. Chandler Cotton Oil Co.*, 25 Okla. 82, 106 Pac. 10.

courts generally held that the phrase "under a common control, management, or arrangement," applied to rail carriers whose lines were wholly within a single state as well as to water carriers. Such railroads, therefore, were immune from federal control and did not become subject to the statute unless they voluntarily entered into some common arrangement, control or management for the continuous shipment of goods or carriage of passengers in interstate or foreign commerce.<sup>22</sup>

But as changed by the Hepburn Amendment of 1906, the provisions of the Act now apply to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment) from one state," etc. By the insertion of the parenthesis in the passage of the Hepburn Act, the phrase "common control, management or arrangement" was eliminated as to carriers by rail, and it now applies only to transportation partly by railroad and partly by water. As the statute now reads, the test of federal control and jurisdiction over railroads wholly within a single state is not the common arrangement which such railroads may make with other carriers for interstate transportation, but their subjection to federal control is determined by the character of the transportation itself.

If such carriers accept freight for shipment to another state, they thereby become engaged in inter-

22. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *United States v. Pennsylvania R. Co.*, 153 Fed. 625; *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452; *Interstate Stock-Yards Co. v. Indianapolis Union Ry. Co.*, 99 Fed. 472; *United States ex rel. Interstate Commerce Commission v.*

*Seaboard Ry. Co.*, 82 Fed. 563; *United States ex rel. Interstate Commerce Commission v. Chicago, K. & S. R. Co.*, 81 Fed. 783; *Interstate Commerce Commission v. Beilaire, Z. & C. Ry. Co.*, 77 Fed. 942; *Tozer v. United States*, 52 Fed. 917; *Chicago & N. W. Ry. Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912; *Railroad Commission of Georgia v. Clyde Steamship Co.*, 4 I. C. R. 120, 5 I. C. C., 324.

state commerce within the purview of the statute, for the movement of freight from the beginning of transportation to the end must be treated as an entirety. Interstate transportation commences with the delivery to the carrier at point of shipment and ends with delivery by the carrier at point of destination.<sup>23</sup> The

23. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co.*, 236 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1094, 32 Sup. Ct. 653; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893. *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305. The change made by the Hepburn amendment as to railroads wholly within a single state, is well and accurately stated by Commissioner Prouty in *Leonard v. Kansas City Southern Ry. Co.*, 13 I. C. C. 573, as follows: "When it transpired upon that hearing that the real question was to concern the future and not the past, the complainant asked to amend its complaint so as to pray for the establishment of a joint through rate over the lines of the Kansas City Southern and the Belt Railway upon coal from points without the State of Missouri to Westport. The complaint was so

amended and the case has proceeded as though such had been the original complaint. Has this Commission, then, jurisdiction to establish over the Belt Railway such a joint rate? Has it jurisdiction with respect to this coal traffic to determine either the entire through rate or the rates which shall be severally applied by the Kansas City Southern up to Dodson and by the Belt Railway from Dodson? These questions, in our opinion, must be answered in the affirmative. Interstate transportation is interstate commerce. That transportation begins when property is delivered to a railroad in one state for continuous shipment to a point in another state, and it continues until delivery at the point of destination. Every railroad participating in that transportation is subject to the provisions of the act to regulate commerce. At the outset of this discussion the difference between the jurisdiction of the original act to regulate commerce and that of the so-called Hepburn amendment of June 29, 1906, should be carefully noted. By its terms the provisions of the original act applied to 'any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous car-



interstate character of the freight commences with the one and concludes with the other.

riage or shipment.' The commission held that the words 'under a common control, management, or arrangement' applied only to cases where the shipment was partly by water and partly by railroad; but the decisions and intimations of the Federal courts, including the Supreme Court of the United States, were generally to the effect that these words applied to a route composed wholly of railroads as well as to one which was partly by railroad and partly by water. *Interstate Commerce Commission v. C. N. O. & T. P. Ry. Co.*, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. Rep. 887; *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. Rep. 209; *Chicago & Northwestern Ry. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A., 347, 10 U. S. App. 430, 52 Fed. 912; *Tozer v. U. S.* 4 Inters. Com. Rep. 245, 52 Fed. 917. The significance of this holding is obvious. The railroad located wholly within a state does not transport passengers upon its own line from a point in one state to a point in another state. It was not, therefore, subject to the provisions of the act to regulate commerce unless, by common ownership or control, or by some arrangement, it became part of a line which did handle traffic between the states. Whether a state railroad was subject to the act depended upon whether it had entered into such arrangements with other railroads, and since the making of the arrangement was a voluntary act

upon the part of the state railroad, that railroad could exercise its election to be or not to be subject to Federal jurisdiction. Otherwise stated, the jurisdiction of this Commission was not determined by the character of the transportation in which the state railroad engaged, but by the nature of the arrangement under which that business was handled. As changed by the Hepburn amendment, the provisions of the act now apply to 'any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one state or territory of the United States,' etc. The words 'common control, management or arrangement,' now plainly apply only to transportation which is partly by railroad and partly by water. With respect, therefore, to transportation entirely by rail the words in parenthesis may be eliminated from the statute. The terms of the act now apply to 'any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad from one state or territory in the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia.' Under the present act the test of jurisdiction is not the arrangement under which the freight is handled, but rather the character of the transportation itself. The plain language of the act subjects any carrier which en-

Any carrier that assists to any extent in the movement of such a commodity is subject to the Act, whether that service is performed wholly in one city or in one state or in more than one state, and whether the service is carriage or switching. A carrier, therefore, with a line confined wholly within a single state is subject to the Act, if it accepts any shipments intended for continuous passage to any point in another state or foreign country.

**§ 91. Carriers Engaged in Transportation Between Points in United States and Adjacent Foreign Countries.**

Section 1 provides that transportation of persons or property wholly by rail, or partly by rail and partly by water under a common arrangement, management or control, from any place in the United States to any adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, shall be subject to all the provisions of the statute. Thus, in an early case before the Commission, it appeared that the Grand Trunk Railway Company of Canada had published and filed a rate of one dollar per ton on coal, coke, etc., from Buffalo and other cities in the United States to certain points in Canada, but quoted a special rate of seventy-five cents per ton, and the traffic was carried at such a rate.<sup>24</sup> The company urged that its Canadian line and the traffic carried by it from points in the United States to points in Canada were not under the jurisdiction of the

gages in the movement of freight by rail from a point in one state to a point in another state to its provisions. This must be so unless that portion of the transportation conducted entirely within a state is not to be regarded as a part of the entire through movement. The question really is, Is the movement from beginning to end to be treated as one entirety, or can it be split up into separate movements which are

only subject to the act to regulate commerce when performed under some arrangement which makes the carrier part of a through line over which the traffic moves? Both upon authority and upon principle the movement must be treated as an entirety, every part of which is subject to federal control."

24. In the Matter of the Investigation of the Rates of the Grand Trunk Ry. Co. of Canada, 2 I. C. R. 496.

Interstate Commerce Commission, but the Commission held that the carrier was amenable to the statute as to such transportation and had violated the provisions of the Act.

The Interstate Commerce Act does not, however, apply to transportation carried entirely within the boundaries of a foreign country. For example, the Commission has no authority to regulate the rates for transportation between points wholly in Canada;<sup>25</sup> nor has the Commission any jurisdiction over transportation wholly within the country of Mexico.<sup>26</sup> But when a foreign carrier comes into the United States to compete for traffic, it should be content to operate upon the same terms as its American competitors.<sup>27</sup>

**§ 92. Carriers by Water Included as to Continuous Shipments Under Common Arrangements with Carriers by Rail.** Among the common carriers subject to the provisions of the Interstate Commerce Act are carriers engaged in the transportation of persons or property partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment from one state or territory to another state or territory. Carriers wholly by water are therefore exempt from the provisions of the Act.<sup>28</sup>

25. *Fullerton Lumber & Shingle Co. v. Bellingham B. & B. C. R. Co.*, 25 I. C. C. 375; *Humboldt Steamship Co. v. White Pass & Y. Ry. Co.*, 25 I. C. C. 136.

26. *Eagle Pass Lumber Co. v. National Rys. of Mexico*, 25 I. C. C. 5.

27. *In the Matter of Disturbance in Passenger Rates by Canadian P. R. Co.*, 8 I. C. R. 71.

28. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; *Ex Parte Koehler*, 30 Fed. 867; *Lake-and-Rail Butter*

*and Egg Rates*, 29 I. C. C. 45; *Arkansas Pass Channel & Dock Co. v. Galveston, H. & S. A. Ry. Co.*, 27 I. C. C. 403; *Augusta & Savannah Steamboat Co. v. Ocean Steamship Co. of Savannah*, 26 I. C. C. 380; *Galveston Commercial Association v. Atchison, T. & S. F. Ry. Co.*, 25 I. C. C. 216; *Escanaba Business Men's Association v. Ann Arbor, R. Co.*, 24 I. C. C. 11; *In the Matter of Transportation by the Chesapeake & O. Ry. Co.*, 21 I. C. C. 207; *In the Matter of Jurisdiction over Water Carriers*, 15 I. C. C. 205; *Ullman v. Adams Exp.*

The primary purpose of Congress in the passage of the statute was to regulate transportation by railroad. The control of carriers by water was merely incidental and collateral, and they were included so that the regulation of carriers by rail might be effective and not be destroyed by subterfuges and contracts entered into with water lines.<sup>29</sup> When water carriers become amenable to the requirements of the statute and the jurisdiction of the Interstate Commerce Commission, they do so by choice in entering into a common arrangement or control with railroads.<sup>30</sup>

But even when water carriers enter into or adopt a common management, arrangement or control with carriers by rail for continuous transportation, the jurisdiction of the Interstate Commerce Commission only extends to the traffic so carried under a common control. As to traffic by water not transported under such a common control, management, or arrangement, the federal statute does not control and the Commission has no power to regulate it. The jurisdiction of the Interstate Commerce Commission as to both carriers by water and traffic carried by them, is confined strictly to those water carriers and traffic carried in a continuous shipment and under a common control and management with carriers by rail.<sup>31</sup> For example, the Commission

Co., 14 I. C. C. 340; *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C. 266.

29. *In the Matter of Jurisdiction over Water Carriers*, 15 I. C. C. 205.

30. *Wilmington Transp. Co. v. Railroad Commission of California*, 236 U. S. 151, 59 L. Ed. 508, 35 Sup. Ct. 276; *Interstate Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; *Mutual Transit Co. v. United States*, 102 C. C. A. 164, 178 Fed. 664; *Camden Iron Works v. United States*, 85 C. C. A. 585, 158 Fed. 561; *United States v. Wood*, 145 Fed. 405; *Lake-and-Rail*

*Butter & Egg Rates*, 29 I. C. C. 45; *Augusta & Savannah Steamboat Co. v. Ocean Steamship Co. of Savannah*, 26 I. C. C. 380; *Ullman v. Adams Exp. Co.*, 14 I. C. C. 340; *Lykes Steamship Line v. Commercial Union et al*, 13 I. C. C. 310.

31. *In the Matter of Jurisdiction over Water Carriers*, 15 I. C. C. 205, in which the Commission said: "As a fundamental proposition it is obvious that interstate commerce wholly by railroad is subject to the Act and that interstate commerce wholly by water is not subject to the Act. It is equally obvious that interstate



has the power to compel common carriers by water, carrying passengers and property in interstate commerce under joint tariffs with railroad companies, to adopt certain methods of accounts and bookkeeping as to operating expenses and revenues, and to report concerning their corporate organization, financial condition, etc., to the Commission.<sup>32</sup> In a complaint against ocean carriers between American and European ports, it was alleged that the defendants carried traffic on through bills of lading between points in the United States and European ports under a pooling agreement by which the traffic was divided by agreement and each carrier received a certain per cent, thus destroying competition. The Commission sustained a demurrer to the complaint because it had no jurisdiction as to the ocean carriage.<sup>33</sup> Ocean rates are not within the jurisdiction

commerce partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment, is subject to the Act. Does the fact that some of the commerce transported by a carrier is subject to the Act *ipso facto* render all the commerce transported by that carrier subject to the Act? \* \* \* Traffic wholly within a state is not subject to the Act, for the reason that Congress has no authority to regulate such traffic. Traffic wholly by water is not subject to the Act, for the reason that Congress did not in that statute exercise its admitted authority over interstate transportation by water. The Commission's only duty is to execute the mandate of Congress. The language of the provision in question indicates its meaning. The Act applies to any common carrier or carriers engaged in transportation partly by rail and partly by water when both are used under a common control, management, or ar-

rangement for a continuous carriage or shipment. The use of the word 'when' is significant, and its natural meaning seems to be that a water carrier is subject to the act 'in so far as' or 'to such extent as' it carries traffic under a common control, management, or arrangement with a railroad. It need hardly be stated that the Act does not require publication of or adherence to rates upon purely intrastate traffic. With regard, then, to the history and purpose of the enactment, the language used and the rules of statutory construction which have been mentioned, it is difficult to see how serious doubt can arise that Congress did not intend to regulate the charges exacted upon the port-to-port business of water carriers."

32. Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436.

33. Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., 13 I. C. C. 266.

of the Commission and in dealing with import and export rates, the ports are considered as destinations and not gateways.<sup>34</sup>

**§ 93. Independent Ferry Companies Included as to Shipments Under Common Arrangement with Rail Carriers.** A ferry has been defined to be a continuation of a highway from one side of the water over which it passes to the other, and is for transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them.<sup>35</sup>

The Interstate Commerce Act provides that the term "railroad" shall include all ferries used or operated in connection with any railroad. However, the ferries contemplated by this definition are those controlled by a rail carrier as a part of its line and as owner, lessee or licensee.<sup>36</sup> Independent ferry companies are water carriers. They are not, therefore, subject to the jurisdiction of the Interstate Commerce Commission under the statute unless they are engaged in the transportation of persons or property under a common control, arrangement or management for a continuous shipment with a carrier by rail.<sup>37</sup> As to traffic not so transported under a common arrangement, ferry companies are not subject to the provisions of the statute.<sup>38</sup>

Since Congress has assumed jurisdiction over ferries used by railroad companies, the states have no power to fix rates of ferriage over streams which constitute the

34. *Chamber of Commerce of State of New York v. New York Cent. & H. River R. Co.*, 24 I. C. C. 55.

35. *St. Clair County v. Interstate Sand & Car Transfer Co.*, 192 U. S. 454, 48 L. Ed. 518, 24 Sup. Ct. 300.

36. *In re Grain from Milwaukee, Wisconsin*, 33 I. C. C. 417.

37. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567,

2 L. R. A. 289; *Enterprise Transp. Co. v. Pennsylvania R. Co.*, 12 I. C. C. 326.

38. *In the Matter of Jurisdiction over Water Carriers*, 15 I. C. C. 205. They are, however, subject to the jurisdiction of the Commission in exercising its powers under the Panama Canal Act without regard to the question of common ownership or arrangements.

boundary between two states, and this is true, it has been held, even as to passengers on such ferries other than railroad passengers.<sup>39</sup> But in the absence of legislation by Congress it has been held that a state has the power to fix reasonable rates for ferriage over a stream which is the boundary between two states when such ferries are not operated in connection with any railroad. The right of the state in such cases is limited to the regulation of rates from its own shores to the shores of another state, that is, each state may fix the rates for outbound journeys only.<sup>40</sup> The court, in the case last cited, held that the regulation of rates as to such ferries, was not a subject matter which required a general system of control or uniformity of regulation, and, therefore, the power of Congress was not exclusive, but that the subject matter was essentially a local one requiring regulation according to local conditions.

On the other hand, neither a state nor a municipality, even in the absence of legislation by Congress, has the power to compel ferry companies operating boats between two states or between the United States and Canada to obtain a license before engaging in the business of operating a ferry boat. For example, an ordinance of the City of Sault Ste. Marie, Michigan, requiring all operators of ferry boats between that city and the Ontario shore across St. Mary's River in Canada to pay a license fee, was held to be invalid for the reason that it was a tax assessed by the state for the privilege of carrying on foreign commerce which is under the exclusive jurisdiction of Congress.<sup>41</sup>

Both of these decisions, one denying the power of the state to exact a license for carrying on the business of interstate or foreign ferriage, and the other affirming

39. *New York Cent. & H. River R. Co. v. Board Chosen Freeholders County of Hudson*, 227 U. S. 248, 57 L. Ed. 499, 33 Sup. Ct. 269.

40. *Port Richmond & B. P. Ferry Co. v. Board Chosen Freeholders County of Hudson*, 234

U. S. 317, 58 L. Ed. 1330, 34 Sup. Ct. 821.

41. *City of Sault Ste. Marie v. International Transit Co.* 234 U. S. 333, 58 L. Ed. 1337, 34 Sup. Ct. 826, 52 L. R. A. (N. S.) 574.

the power of the state to fix the rate for such ferriage, were delivered on the same day. In another case, the federal Supreme Court held that a tax imposed by the state of Pennsylvania on a ferry company operating between Gloucester, New Jersey and the City of Philadelphia for the landing of passengers and freight at the wharf in Philadelphia, was a direct burden upon interstate commerce and, therefore, void as an interference with the power of Congress.<sup>42</sup> Similarly, an Illinois statute requiring ferry companies operating across the Missouri River from the Illinois shore to the Missouri shore to take out a license, was held invalid as to the transportation of railroad cars.<sup>43</sup>

§ 94. **Common Control, Management, and Arrangement for Continuous Transportation, Defined and Explained.** The phrase "common control, management, or arrangement for a continuous carriage or shipment" in the first section of the Act, prior to the Hepburn Amendment, covered interstate and foreign traffic carried through over all-rail as well as part water and part rail lines; but since the amendment of 1906, the phrase is applicable solely to transportation partly by rail and partly by water.

The meaning of the clause was the source of considerable controversy in the early litigation construing the Act but there is at the present time an unanimity of opinion as to its meaning. So long as the rail and water lines are each operated under a separate and distinct control, each making its own rates and billing for the carriage and delivery of the goods solely to the end of its own line, the act does not apply to water carriers;<sup>44</sup> but the receipt successively by the rail and water carriers for transportation of traffic shipped under through bills for continuous carriage over their

42. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826.

43. St. Clair County v. Interstate Sand & Car Transfer Co., 192

U. S. 454, 48 L. Ed. 518, 24 Sup. Ct. 300.

44. Ex Parte Koehler, 30 Fed. 867.



lines is an assent to a common arrangement for such continuous transportation.<sup>45</sup> Previous formal arrangements between the water and the rail carrier is not necessary to make such transportation under the terms of the law,<sup>46</sup> for whenever the water carrier enters into the carriage of freight by receiving the goods on through bills of lading, it becomes a party to a common arrangement under the statute.<sup>47</sup> While through billing and through rating are the usual evidence of a common arrangement under the statute, neither is essential to the establishment of a common control or management.<sup>48</sup>

When goods are shipped from a point in one state to a point in another and are received in transit by a carrier under a conventional division of the charges, such a carrier must be deemed to have subjected its line to an arrangement for a continuous carriage within the meaning of the Act.<sup>49</sup> The arrangement need not

45. *Railroad Commission of Georgia v. Clyde Steamship Co.*, 4 I. C. C. 120, 5 I. C. C. 324, in which Commissioner Veazey said: "Traffic is either state or interstate according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic, and when carried over two or more lines, it is, by the fact of having been received, forwarded, and delivered as one through shipment, transported under a common control, management, or arrangement, as the case may be, for continuous carriage or shipment. The phrase 'common control, management, or arrangement for continuous carriage or shipment' in the first section was intended to cover all interstate traffic carried through over all rail, or part water and part rail lines. The 'arrangement for continuous carriage or shipment' is complete

whenever the carriers have arranged for delivering and receiving through traffic to and from each other and such an arrangement is necessarily 'common.' This construction of the words 'common arrangement' as used in the first section of the law is in line with our decisions in *Boston Fruit and Produce Exchange v. New York & N. E. R. Co.*, 3 I. C. R. 493, 4 I. C. C. 644 and *Mattingly v. Pennsylvania Co.*, 2 I. C. R. 806, 3 I. C. C. 592 and with other rulings of the Commission."

46. *Standard Oil Co. of New York v. United States*, 103 C. C. A. 172, 179 Fed. 614.

47. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209.

48. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700.

49. *Baer Brothers Mercantile Co. v. Denver & R. G. R. Co.*, 233

LAW LIBRARY  
OF  
LOS ANGELES COUNTY

be shown by a formal contract, but is manifest in the successive receipt and movement of the traffic by the connecting carrier under a through bill of lading for continuous carriage;<sup>50</sup> but in order to establish the common arrangement between a carrier by water and a carrier by rail, it must be shown that the water carrier made the arrangement with the other carrier and not with the shipper. When a lake steamship company and a rail carrier publishing proportional rates, received traffic under a through bill of lading for an interstate shipment and required the prepayment of freight charges, a common arrangement between them is shown.<sup>51</sup>

While some of the decisions cited in the notes were construing the meaning of the term "common arrangement" as to intrastate railroads prior to the 1906 amendment, the principles therein adopted apply with equal force in determining the applicability of the statute to water carriers. If the water and rail carriers have invited interstate traffic over their lines which is intended to be continuous, have so arranged their business that the continuity of the shipment shall be preserved, and have combined their several lines for the reception, carriage and delivery of interstate traffic, such business is within the scope of the statute.<sup>52</sup>

### § 95. Extension of Federal Jurisdiction Over Water Carriers by Panama Canal Act of 1912. Addi-

U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; *United States v. Pennsylvania R. Co.*, 153 Fed. 625; *United States v. Vacuum Oil Co.*, 153 Fed. 598; *Interstate Stock-Yards Co. v. Indianapolis Union Ry. Co.*, 99 Fed. 472; *United States ex rel. Interstate Commerce Commission v. Seaboard Ry. Co.*, 82 Fed. 563; *Augusta Southern R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522.

50. *Mutual Transit Co. v. United States*, 102 C. C. A. 164, 178 Fed. 664; *Goodrich Transit Co. v. Inter-*

state Commerce Commission, 190 Fed. 943; *Chicago, B. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830; *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305; *United States v. Camden Iron Works*, 150 Fed. 214; *United States v. Wood*, 145 Fed. 405.

51. *Tone Brothers v. Illinois Cent. R. Co.*, 26 I. C. C. 279; *Flour City Steamship Co. v. Lehigh Valley R. Co.*, 24 I. C. C. 179.

52. *United States v. Wood*, 145 Fed. 405.

tional jurisdiction over water carriers was conferred upon the Interstate Commerce Commission by the Panama Canal Act passed on August 24, 1912 as an amendment to Section 6 of the Interstate Commerce Act.

This amendment provides that "when property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten: (a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay. The Commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved. (b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water. (d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country. The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the Commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the Commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order."

**§ 96. Amendment Applies to Traffic Between Two Points in United States Passing Through Panama Canal "or Otherwise."** The words "or otherwise" in that part of the Panama Canal Act, which is an amendment of Section 6, do not modify the phrase "by



rail and water" but the phrase "through the Panama Canal." Hence traffic moving from any point to another in the United States by rail and water is subject to the provisions of the Panama Canal Act and the powers of the Interstate Commission thereunder, as well as traffic moving by rail and water through the Panama Canal, without regard to any common arrangement, ownership or management between the water and rail lines, which ordinarily limits the jurisdiction of the Commission. It follows, therefore, that the Commission is empowered under this amendment to establish through routes and maximum joint rates between a rail and water carrier from Augusta and Savannah, Georgia, thence by water to North Atlantic ports and thence by rail to interior destinations in the United States.<sup>53</sup>

53. *Augusta & Savannah Steamship Co. v. Ocean Steamship Co. of Savannah*, 26 I. C. C. 380, in which Commissioner Prouty said: "But our jurisdiction does not rest upon the above ground solely. Since the filing of this petition by the Panama Act, so called, approved August 24, 1912, this body has been given additional jurisdiction over water carriers. The eleventh section of that act amends section 6 of the Act to Regulate Commerce as follows: 'When property may be or is transported from point to point in the United States by rail and water, through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to Regulate Commerce, as amended June Eighth-

teenth, Nineteen Hundred and Ten: \* \* \* (b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.' If the above amendment applies to the traffic in question, the right of the Commission to establish this through route is clear. The defendants contend that it does not apply, for the reason that this amendment relates only to traffic which passes through the Panama Canal. They argue that the words 'or otherwise' modify the phrase 'by rail and water' and not the phrase 'through the Panama Canal.' But the plain everyday-reading of the Act is 'through the Panama Canal or otherwise,' and the defendants have referred us to no canon of construction nor to any reason for disregarding the obvious meaning of these words. Indeed, a consideration of the situation to which the amendment applies would seem

Likewise property transported in interstate commerce from interior points in the United States over a railroad to Pensacola, Fla., and from there by steamship to Mobile, Ala., and Carabelle, Fla., is subject to the jurisdiction of the Commission to fix the rates to and from the port to be applied to such traffic, and the Commission may determine in connection with what vessels and upon what terms and conditions such rates shall apply.<sup>54</sup>

A responsible common carrier operating upon a navigable river, it was held in another case,<sup>55</sup> is warranted in requesting the Commission to compel a railroad company to join with it in establishing through routes and joint rates between landings on the river points on the line of the railroad company.

While railroad companies are not ordinarily required to make through routes and joint rates with all boat lines which happen to be in a position to carry freight to a railroad station, irrespective of their financial responsibility and equipment, yet when boat lines are in fact common carriers and have met all reasonable requirements of connecting railroads they should be permitted to establish through routes and publish joint rates.<sup>56</sup>

to conclusively demonstrate that the position of the defendants is not correct, since the words 'or otherwise' are pure surplusage if read as the defendants say they should be. Traffic through the Panama Canal can only move by rail and water, unless it moves from port to port, and in that case we have no jurisdiction. We hold, therefore, that the Commission has jurisdiction to establish the through routes and the joint rates prayed for."

54. *In re Wharfage Facilities at Pensacola, Florida*, 27 I. C. C. 252, in which the Commission said: "It is to be noted that this power

(Panama Canal Act amending Section 6) expressly relates to domestic traffic and exists whether such traffic is to or from either competitive or non-competitive points."

55. *Decatur Navigation Co. v. Louisville & N. R. Co.* 31 I. C. C. 281. See also *Bowling Green Business Men's Protective Association v. Evansville & Bowling Green Packet Co.*, 31 I. C. C. 301; *Tampa Board of Trade v. Louisville & N. R. Co.*, 30 I. C. C. 377.

56. *Truckers Transfer Co. v. Charleston & W. C. Ry.*, 27 I. C. C. 275. Commission Meyer said: "Any boat line legitimately acting as a common carrier should be per-

**§ 97. Control or Ownership of Competitive Water Line by Rail Carrier Subject to Approval of Commission.**

One of the provisions of the Panama Canal Act passed on August 24, 1912, and added as an amendment to Section 5 of the Interstate Commerce Act, prescribes that after July 1, 1914, it shall be unlawful for any railroad company or other common carrier subject to the Act to Regulate Commerce to own, lease, operate, control or have any interest whatsoever in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier does or may compete for traffic, or any vessel carrying freight or passengers upon said water route or elsewhere with which such railroad or other common carrier does or may compete for traffic, and in case of a violation of the said provision, each day in which such violation continues shall be deemed a separate offense.

This amendment further confers jurisdiction upon the Interstate Commerce Commission to determine questions of fact as to competition, or possibility of competition, and, after full hearing, the Commission is given the power to extend the time during which any existing specified service by water other than through the Panama Canal, may continue under the ownership or control of the rail carriers, provided, however, such service is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent nor reduce competition on the route by water.<sup>57</sup>

mitted to file tariffs naming proportional rates to Port Royal or other points similarly situated, to apply on traffic to be carried further by rail, whenever such connection provides an additional service to shippers which may reasonably be demanded. The rail carrier would be justified, in cases where the connection carrier does not possess greater resources than

the two boat lines involved in this case, in demanding financial security before entering into either joint rate arrangements or accepting freight under proportional rates, the entire freight charges to be collected at destination."

57. The text of this part of the Panama Canal Act is as follows: "From and after the first day of July, nineteen hundred and four-

### § 98. Policy of Congress in Adoption of That Part of Panama Canal Act Forbidding Ownership of

teen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense. Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The Commission may on its own motion or the application of any vessel in use by any railroad or other carrier which has not applied to the Commission and had the question of competi-

tion or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final. If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the Act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: Provided, any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter. No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated,



**Water Lines by Railroads.** The amendment of 1912 to Section 5 requiring a discontinuance of railroad ownership and control of water lines indicates a clear and unmistakable policy on the part of Congress to separate from railroad ownership, control or influence, such common carrier water lines, and such vessels, as may, when thus separated, compete with the owning or controlling companies, except where, upon investigation, it is found by the Commission, that the service by water, other than through the Panama Canal, is being operated in the interest of the public, is of advantage to the convenience and commerce of the people, and that its continuance will neither exclude, prevent nor reduce competition on the route by water.<sup>58</sup>

The general purpose of Congress in the enactment of the Panama Canal Act was to preserve, free and unfettered, the road-bed via the Panama Canal, and as this phrase is qualified by the words "or elsewhere" the statute necessarily means that all the water routes of the country must be restored to the same condition of freedom and from any dominion that would reduce their usefulness.<sup>59</sup> The words "may compete for traffic" do not mean a vague, possible competition, but mean

or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly

known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States."

58. In re Application Southern P. Co., operation of Pacific Mail S. S. Co. 32 I. C. C. 690.

59. In re Application Lake Tahoe Ry. & Transp. Co., ownership of boat line, 33 I. C. C. 699.

<sup>1</sup> Control Carriers 15

a probable, potential competition. The best practical test in determining competition under the amendment is whether or not there would be normal, active competition between the rail line and the water line if operated independently of each other.<sup>60</sup>

While the first paragraph of amendment in describing the carrier by water, refers to "common carrier by water" it later prohibits such ownership in "any vessel carrying freight or passengers." It is not, therefore, necessary that a steamer be found to be a common carrier.<sup>61</sup> A rail carrier does not necessarily have to reach a point in order to compete with water carriers that operate directly to that point, but the competition may be found to exist by reason of the rail carrier's participation in the joint rates.<sup>62</sup> Ferry companies are within the terms of the Panama Canal amendment.<sup>63</sup>

**§ 99. Bridges and Bridge Companies Subject to Federal Act, When.** All bridges used or operated in connection with any interstate railroad, whether owned or operated under a contract, agreement or lease, are, under the provisions of Section 1, included within the term "railroad" as used therein. In construing the original act, the courts held that when a railroad company by contract acquired the right to operate its trains over a bridge, the railroad company was regarded as the common carrier in control of the bridge; but the bridge company itself was not a common carrier subject to the statute as it did not transport persons and property and hold itself out as a common carrier.<sup>64</sup>

60. In re Application Southern P. Co., ownership of Oil Steamers, 37 I. C. C. 528.

61. In re Application Southern P. Co., ownership of Schooner Pasadena, 33 I. C. C. 476.

62. In re Application Southern P. Co., ownership of Oil Steamers, 34 I. C. C. 77; In re Application Pennsylvania Co., operation of

Pennsylvania-Ontario Transp. Co., 34 I. C. C. 47.

63. In re Application Buffalo, R. & P. Ry. Co., operation Ontario Car Ferry Co., 34 I. C. C. 52; In re Application Grand T. Ry. Co. of Canada, operation Ontario Car Ferry Co., 34 I. C. C. 49.

64. Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 2 L. R. A. 289.

When, however, a bridge company assumes the duties of a common carrier and participates to any extent in the movement of interstate or foreign shipments, then the bridge company is subject to the jurisdiction of the Interstate Commerce Commission as to the rates charged.<sup>65</sup> Bridges across rivers connecting two states or at any point on the line of an interstate railroad are instruments of interstate commerce,<sup>66</sup> and the states have no power to regulate the rates over them even in the absence of the exercise of the potential power of Congress over them.<sup>67</sup> But the Interstate Commerce Commission has no power to regulate the fares charged by a street railroad over a bridge connecting two cities in different states not because the bridge is not an instrument of interstate commerce, but because Congress has not given the power to the Commission to regulate the fares of street railroads crossing state lines;<sup>68</sup> nor has the Interstate Commerce Commission jurisdiction over a bridge connecting two states which is independent and not connected with any railroad.<sup>69</sup>

The reasonableness of tolls over bridges which are instrumentalities of interstate commerce by railroad, is under the jurisdiction of the Interstate Commerce Commission, and it has been held that the question of absorption of bridge tolls by railroads is largely a matter of policy controlled by the carriers; but there must be no undue discriminations, and, when the circumstances are similar, a railroad company cannot absorb the bridge toll at one crossing, and refuse it at another.<sup>70</sup>

65. *West End Improvement Club v. Omaha & C. B. Railway & Bridge Co.*, 17 I. C. C. 239.

66. *South Covington & C. St. R. Co. v. City of Covington*, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F 792; *Kansas City Southern Ry. Co. v. Kaw Valley Drainage Dist.*, 233 U. S. 75, 58 L. Ed. 857, 34 Sup. Ct. 564; *Covington & C. Bridge Co. v. Com.*, 154 U. S. 204, 38 L. Ed. 962, 14 Sup. Ct. 1087.

67. *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 59 L. Ed. 939, 35 Sup. Ct. 551.

68. *Omaha & C. B. St. R. Co. v. Interstate Commerce Commission*, 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 46 L. R. A. (N. S.) 385.

69. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

70. *Paducah Board of Trade v. Illinois Cent. R. Co.*, 29 I. C. C.



A bridge company which is not a common carrier, has no rolling stock or motive power, and is not used in connection with any railroad, cannot be compelled to grant a street railroad the right to use the bridge for transporting the passenger cars of an interstate electric railroad, as it is not, under such circumstances, a common carrier within the meaning of the act.<sup>71</sup> "Is the bridge company," said the Commission in the case last cited, "a common carrier subject to the act to regulate commerce? In *Kentucky & I. Bridge Co. v. L. & N. Ry. Co.*, 37 Fed., 567, the circuit court held that: 'Where a railway company, by contract with a bridge company, acquires the right to use a bridge with its approaches, for the engines, cars, and trains of the railway company, the first section of the 'act to regulate commerce' regards the railway company as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by the railway company over the bridge; and as to all such traffic the railway company, and not the bridge company, must be regarded as the common carrier. Such a bridge company is not, either in law or in fact, a common carrier of interstate traffic within the scope and meaning of said section, and it can not invoke the provisions of said act to compel railway companies to transact business with or through such bridge company. Between such a bridge company and the railway carriers of the country the act establishes no such reciprocal relations, duties, and obligations as require the latter to form business connections with the former.' In *Enterprise Transportation Co. v. P. R. R. Co.*, 12 I. C. C., 326, the Commission held that: 'Bridges, ferries, switches, and terminal facilities are

593; *Norman Lumber Co. v. Louisville & N. R. Co.*, 29 I. C. C. 565; *East Dubuque Supply Co. v. Illinois Cent. R. Co.*, 28 I. C. C. 425; *Manufacturers & Merchants Ass'n of New Albany v. Aberdeen & A. R. Co.*, 25 I. C. C. 116; *Hafer Lumber Co. v. Chicago & N. W.*

*R. Co.*, 25 I. C. C. 27; *Manufacturers & Merchants Ass'n v. Aberdeen & A. R. Co.*, 24 I. C. C. 331.

71. *Kansas City, Missouri and Kansas City, Kansas v. Kansas City Viaduct & Terminal Ry. Co.*, 24 I. C. C. 22.



declared to be included within the term 'railroad' not for the purpose of exempting them from any liability to publish and observe their rates when such ferries or bridges are operated by their owners as common carriers, but rather to make certain that where those agencies are employed by railroads the transportation service rendered by them shall still be subject to the provisions of the act to regulate commerce \* \* \*. A railroad company may without doubt provide by contract with an independent company for the construction of a bridge or ferry to be used as a part of its line. It can perhaps extend its contract to the operation of the bridge or ferry by its owner when constructed, but in such case the bridge company or the ferry company is not a common carrier. The railroad is the carrier and answerable to the law as such.' A common carrier is one who holds himself out as ready to engage in transportation for hire as a public employment, and in general the liability of a carrier does not attach to one who does not so hold himself out. The bridge company in the instant case does not hold itself out to be a common carrier or a carrier of passengers and freight. No freight has ever been transported by rail across its structure and the passengers which were carried over it were transported in the cars and by the motive power of the street railway company. It has no motive power and no rolling stock. Its structure is not now, although it has been in the past, rented to or operated in connection with any railroad. Foot passengers, vehicles, and animals pass over the structure. They are interstate commerce, but not such as is subject to the provisions of the act to regulate commerce. The bridge company rents or is willing to rent its structure, but in our view it is not a common carrier subject to our act. Clearly the street railway company is subject to our jurisdiction. But, inasmuch as we have no power to require the bridge company to obey any of the provisions of the act to regulate commerce, how can we exercise jurisdiction over the street railway company to the extent of requiring it to operate over the viaduct? How could we

require the bridge company to grant to the street railway company the right to use the viaduct? The present case is essentially different from the Omaha & Council Bluffs case, *supra*, in that there the defendant was a common carrier of interstate passengers. In the establishment of a through route the power of the Commission is limited by the provision that it 'shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character.' The bridge company is neither a railroad, a water line, or a common carrier, and we have no jurisdiction over it."

§ 100. **Street Railroads Crossing State Lines not Subject to Interstate Commerce Act.** For many years the Interstate Commerce Commission held that ordinary street railway companies engaged in transporting passengers across a state line were common carriers by "railroad" within the Act.<sup>72</sup> While recognizing that the term "railroad" usually applied and meant ordinarily commercial railroads and not street railroads, the Commission adopted the view that it was the evident intention of Congress to include within the Act any and all carriers engaged in interstate commerce by railroad. An order was, therefore, made prohibiting a bridge company operating a street railroad across the Missouri River from Council Bluffs, Iowa, to Omaha, Nebraska, from charging more than ten cents for a trip between the two states.<sup>73</sup>

Subsequently, upon a suit to annul the order, the court held that the Interstate Commerce Act did not

72. *Bitzer v. Washington-Virginia Ry. Co.*, 24 I. C. C. 255; *Kansas City, Missouri and Kansas City, Kansas v. Kansas City Viaduct & Terminal Ry. Co.*, 24 I. C. C. 22; *Boyle v. Great Falls & Old Dominion R. Co.*, 20 I. C.

C. 232; *Willson v. Rock Creek Ry. Co. of District of Columbia*, 7 I. C. R. 83.

73. *West End Improvement Club v. Omaha & C. B. Railway & Bridge Co.*, 17 I. C. C. 239.

apply to street railway companies, and a motion for a preliminary injunction was granted.<sup>74</sup> The case was then transferred to the Commerce Court, and, on a demurrer, to the bill that court held that the statute included street railroads.<sup>75</sup> On appeal of the same case to the United States Supreme Court, it was finally decided that the statute did not include ordinary street railroads.<sup>76</sup> The court said: "The appellants cite decisions from twelve states holding that in a statute the word 'railroad' does not mean 'street railroad.' The defense cite decisions to the contrary from an equal number of states. The present record discloses a similar disagreement in federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson v. Rock Creek Ry. Co.*, 7 I. C. C. 83. This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word 'railroad' includes street railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that 'railroad' does not include street railroad unless required by the context, since, as tersely put by the Court

74. *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 179 Fed. 243. The Court cited the following cases: *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099; *State v. Duluth St. Ry. Co.*, 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032; *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. 82; *Board of Railroad Com'rs v. Market St. Ry. Co.*, 132 Cal. 677, 64 Pac. 1065; *Gyger v. Philadelphia City Passenger Ry. Co.*, 136 Pa. 96, 20 Atl. 399; *Kansas City, O. B. & E. R.*

*Co. v. Board of Railroad Com'rs*, 73 Kan. 168, 61 L. R. A. 475, 84 Pac. 755; *Sams v. St. Louis & M. R. Co.*, 174 Mo. 53, 73 S. W. 686; *Thompson-Houston Elec. Co. v. Simon*, 20 Or. 60, 10 L. R. A. 251, 23 Am. St. Rep. 86, 25 Pac. 147.

75. *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 191 Fed. 40.

76. *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 46 L. R. A. (N. S.) 385.



of Appeals of Kentucky, 'a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road.' *Louisville & Portland R. R. Co. v. Louisville City Ry. Co.*, 2 Duvall, 175. But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these streets railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between States,' 'between States and Territories,' 'between the United States and foreign countries.' The act referred to railroads which were required to post their schedules—not at street corners where passengers board street cars, but in 'every depot, station or office where passengers or freight are received for transportation.' The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they



should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce. Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit. This was recognized in *Willson v. Rock Creek Ry. Co.*, 7 I. C. C. 83, where, although it was held that the statute applied to a street railroad between Washington, D. C., and a point in Maryland, the Commission nevertheless said (7 I. C. C. 88): 'It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads in their dealing with the public.' Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include street railroad."

**§ 101. Electric Interurban Railroads Engaged in Interstate Commerce Controlled by Statute.** Electric interurban railroads are within the statute and the jurisdiction of the Commission thereunder when engaged in interstate commerce.<sup>77</sup> There is no inconsistency in holding that these railroads are subject to the statute and that street railroads are not, for street railroads are laid in streets as aids to street traffic and usually for

77. *Chicago, O. & P. Ry. Co. v. Chicago & N. W. Ry.*, 33 I. C. C. 573.

the use of a single community, even if that community is divided by state lines or is under different municipal control. But electric interurban railroads run through the country from town to town and usually haul passengers, freight, express and mail for long distances and at high speed.<sup>78</sup> The statute makes no distinction between "railroads" that are operated by electricity and those that use steam.<sup>79</sup>

**§ 102. Status of Terminal Railroads and Belt Lines Participating in Movement of Interstate Traffic.** Terminal and belt railroads hauling traffic between the termini of trunk lines and industries are common carriers within the meaning of the Act if they participate to any extent in the movement of interstate or foreign shipments.

The length of a railroad is entirely immaterial in determining whether it is a common carrier engaged in interstate commerce. In fact, the Act itself defines a railroad as including all switches, tracks and terminal facilities used or necessary in the transportation of persons or property. This necessarily includes a railroad confined strictly within the boundaries of a single city or county. For example, a stock yards company which owned terminal facilities for transporting interstate shipments from trunk lines to the stock yards at Chicago and its lessee which operated and hauled the cars over such railroad, were both held to be common carriers and amenable to all the provisions of the Interstate

78. *United States v. Butler County R. Co.*, 234 U. S. 29, 58 L. Ed. 1196, 34 Sup. Ct. 748; *United States v. Louisiana & Pac. R. Co.*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

79. *Chicago & M. E. R. Co. v. Illinois Cent. R. Co.*, 13 I. C. C. 20, in which Commissioner Harlan said: "The act makes no distinction between railroads that are operated by electricity and those that use steam; nor has the Commission thought at any time to

make such distinction. Both are subject to the Act when engaged in interstate transportation and are entitled to equal consideration in any controversy before us. Moreover, progress in the science of electricity and the rapid increase in new devices for its application have led many practical railroad men to think that we may be measurably near its general use as the chief motive power in transportation."

Commerce Act.<sup>80</sup> The fact that neither of them issued through bills of lading was not controlling; for it is the character of the service and not the manner of hauling that determines their interstate status.

Similarly a company which furnished terminal facilities for trunk lines and a steamship system of which it formed a part, was held to be a common carrier and under the control of the Interstate Commerce Commission to the extent that the commerce handled by it was interstate.<sup>81</sup> To hold that such companies are not within the purview of the Act would enable the railroad companies to exempt their terminal facilities from the control of the Interstate Commerce Commission by organizing separate corporations. The states and state commissions have no power to regulate and determine the terminal charges for switching service as to interstate shipments.<sup>82</sup> In the regulation of interstate and foreign

80. *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83.

81. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279. See also *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; *Southern R. Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678; *Interstate Commerce Commission v. Chicago B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824, Judge McKenna, in *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, *supra*, said: "The terminal company owns no cars or locomotives and issues no bill of lading. It owns no stock in any of the railroads or corporations in which the Southern Pacific owns stock. It carries on a wharfage business and publishes a schedule of charges for such business,

which, however, is not filed with the Interstate Commerce Commission. \* \* \* And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, a corporation such as this Terminal Company which has competing lines, should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits."

82. *Wilson Produce Co. v. Pennsylvania R. Co.*, 14 I. C. C. 170.



shipments, terminal companies may be compelled to establish through routes and joint rates.<sup>83</sup>

**§ 103. Stock Yards Company Transferring Live-stock Between its Pens and Tracks of Trunk Lines, a Common Carrier.** The Act to Regulate Commerce, lim-

83. *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370; *Manufacturers Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 21 I. C. C. 304. "The Act as amended June 29, 1906, 34 St. 584" said the Supreme Court in the first case cited, "defines what is meant by common carriers—engaged in transportation by railroad—which are brought within the control of the Act and a railroad is defined to include all switches, spurs, tracks and terminal facilities of every kind, used or necessary in the transportation of persons or property designated in the Act, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property. Not only does the Act define railroads, but it specifically defines what is meant by transportation, which is made to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' It is made the duty of every carrier 'subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just

and reasonable rates applicable thereto'; and on June 18, 1910, c. 309, 36 Stat. 539, 545, it was additionally provided that the carrier should 'provide reasonable facilities for operating such through routes and make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for reasonable compensation to those entitled thereto.' See *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286, and as to the character of such commerce, *Illinois Central R. R. v. Railroad Commission of Louisiana*, decided February 1, 1915, *ante*, p. 157 \* \* \* There can be no question that when the Pennsylvania Railroad used these terminal facilities in connection with the receipt and delivery of carload freight transported in interstate traffic, it was subject to the provisions of the Act, and it was obliged as a common carrier in that capacity to afford all reasonable, proper and equal facilities for the interchange of traffic with connecting lines and for the receiving, forwarding and delivering of property to and from its own lines and such connecting lines, and was obliged not to discriminate in rates and charges between such connecting lines. By the amendments to the Act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated."



iting its application as it does to common carriers, was passed in full view and recognition of the common law under which the attitude and actions of the person, whether natural or artificial, determines whether he or it is in law a common carrier.<sup>84</sup> The test to be applied in determining whether a person is a common carrier really is whether he holds out either expressly, or by a course of conduct, that he will, so long as he has room, carry for hire the goods of every person indifferently who will bring goods to him to be carried;<sup>85</sup> but there must be a *bona fide* holding out as a common carrier coupled with the ability to carry for hire.

A stock yards company, holding itself out in good faith to carry and transport livestock for hire between its stock yards and points of connection with the tracks of trunk lines whose tracks connect with its own, is a common carrier within the purview of the statute.<sup>86</sup> The

84. *Manufacturers Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 93; *Manufacturers Ry. Co. v. St. Louis, I. M. & S. Ry. Co.*, 21 I. C. C. 304.

85. *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 Sup. Ct. 469; *Bank of Kentucky v. Adam's Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627; *Crane Iron Works v. United States*, 209 Fed. 238; *Second Industrial Railways Case*, 34 I. C. C. 596; *In re Rates in Chicago Switching Dist.*, 34 I. C. C. 234; *Industrial Railways Case*, 32 I. C. C. 129; *Stongea Coal & Coke Co. v. Louisville & N. R. Co.*, 23 I. C. C. 17; *General Elec. Co. v. New York Cent. & H. River R. Co.*, 14 I. C. C. 237.

86. *United States v. Union Stockyard and Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Southern Pac. Terminal Co. v. Interstate Com-*

*merce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; *Central Stockyards Co. v. Louisville & N. R. Co.*, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824; *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. Ed. 287, 8 Sup. Ct. 266; *Union Stockyards Co. of Omaha v. United States*, 94 C. C. A. 626, 169 Fed. 404, in which Mr. Justice Van Deventer said: "The carriage of these shipments from the transfer track to the sheds or pens and *vice versa* is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of

Interstate Commerce Commission decided that a stock yards company at Kansas City which held itself out to transport cars of livestock from the trunk lines to its pens solely in order to impose a trackage charge through a published tariff, and whose real purpose was to secure compensation for the use of its tracks from the trunk line, was not a common carrier.<sup>87</sup> Subsequently a similar ruling was made as to some short lines of railroad serving industries.<sup>88</sup>

**§ 104 Status of Logging Roads as Interstate Carriers.—the Tap Line Cases.** The extent of the business of a railroad is not the test or criterion in determining its character as a common carrier, but it is the right of the public to use its facilities and to demand service of it. The application of this principle to small industrial railroads owned by or affiliated with lumber companies in the lumber districts of the country and commonly known as tap lines, led the Supreme Court to set aside the decision and order of the Commission as to the character of these companies.<sup>89</sup>

These logging roads, by which logs are hauled from the timber to the lumber mills and the products thereof from the mills to the trunk lines of the carriers, were, as a rule, originally purely mill propositions, being plant facilities; but many of them soon reached a point where

the loaded cars at the transfer back, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a

part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

87. *Atchison, T. & S. F. Ry. Co. v. Kansas City Stock Yards Co.*, 33 I. C. C. 492.

88. *Second Industrial Railways Case*, 34 I. C. C. 596.

89. *United States v. Butler County R. Co.*, 234 U. S. 29, 58 L. Ed. 1196, 34 Sup. Ct. 748; *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 841.

they engaged in other business to a greater or less extent. As the length of the road increased and the lumber was taken off, other industries obtained a foothold along the line and various commodities besides lumber were transported over these logging roads. In this manner the business of some of these tap lines developed until what was a logging road pure and simple became a common carrier of miscellaneous freight and passengers.<sup>90</sup>

As long as these railroads were engaged exclusively in the transportation of logs of the affiliated lumber companies, they were a part of the plant facilities of the mills owned by the lumber concerns. When, however, they ceased to be private adjuncts of the lumber industries, or mere appendages to the mills, and became common carriers even to a small extent, they thereby became public institutions and subject to regulations as carriers.<sup>91</sup> They then became entitled to participate in joint rates with trunk lines as to proprietary as well as nonproprietary traffic;<sup>92</sup> but if the division of joint rates

90. *Kaul Lumber Co. v. Central of Georgia Ry. Co.*, 20 I. C. C. 450; *Star Grain & Lumber Co. v. Atchison, T. & S. F. R. Co.*, 17 I. C. C. 338, 14 I. C. C. 364; *Central Yellow Pine Ass'n v. Illinois Cent. R. Co.*, 10 I. C. C. 505; *Central Yellow Pine Ass'n v. Vicksburg, S. P. R. Co.*, 10 I. C. C. 193.

91. *Tap Line Case v. Louisiana & P. Ry. Co.*, 34 I. C. C. 116; *Tap Line Case*, 31 I. C. C. 490.

92. "But a common carrier performing service as such, regulated and operated under competent authority, as observed by Commissioner Prouty in *Kaul Lumber Co. v. Central of Georgia Railway Co.*, 20 I. C. C. 450, 456 is no longer a mere appendage of a mill 'but a public institution.' It thus becomes apparent that the real question in these cases is the true character of the roads here in-

volved. Are they plant facilities merely or common carriers with rights and obligations as such? It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts." *Tap Line Cases*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 841.



is such as to amount to a rebate or discrimination in favor of the owner of the tap line because of an excessive amount in view of the service rendered, the Commission may reduce the amount so that the tap line will receive just compensation only.<sup>93</sup>

**§ 105. Private Car Lines Not Common Carriers Within Meaning of Act to Regulate Commerce.** Under the Hepburn Amendment of 1906 the term "transportation" was declared to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership. Railroad companies are therefore answerable for what they hire from private car lines; but private car owners, leasing refrigerator, tank and other cars to railroads and shippers, and who operate stations on railroad lines for the purpose of icing cars for which the railroads pay a certain rate per ton, and who furnish cars for the shipment of perishable fruits and keep them iced, but have no control over the movement of the cars they furnish, are not common carriers within the meaning of the Act. The definition of "transportation" includes such instrumentalities as these car lines furnished to the railroads, but the definition is preliminary to the requirement that the carrier shall furnish them upon reasonable request and reasonable charges. The control of the Commission over private cars is to be effected by its control over the carriers that are subject to the Act.<sup>94</sup>

93. *Industrial Railways Case*, 32 I. C. C. 129.

94. *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 59 L. Ed. 1036, 35 Sup. Ct. 645, in which the Court said: "The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerators, tank and box cars, and that lets these cars to the railroad or to shippers. It also owns and operates icing stations on various lines of railway, and from these ices

and reices the cars, when set by the railroads at the icing plant, by filling the bunkers from the top, after which the railroads remove the cars. The railroads pay a certain rate per ton, and charge the shipper according to tariffs on file with the Commission. Finally it furnishes cars for the shipment of perishable fruits, etc., and keeps them iced, the railroads paying for the same. It has no control over motive power or over the movement of the cars that it



**§ 106. Common Carriers of Oil and Other Commodities by Pipe Line Included.** The Interstate Commerce Act in 1906 was amended so as to include any corporation or any person or persons engaged in the transportation of oil or other commodities, except water and natural or artificial gas, by means of pipe lines or partly by pipe line, and partly by railroad, or partly by pipe line and partly by water, from one state, territory or district of the United States to any other state, territory or district of the United States, or to any foreign country who shall be considered and held to be common carriers within the meaning and purpose of the Act.

As the transportation of oil from one state to another constitutes interstate commerce, those pipe line companies which hold themselves out as common carriers of oil or other commodities, except water and gas, by pipe line are subject to the jurisdiction of the Commission. The fact that the pipe line was built over a privately acquired right of way does not affect its status, nor is the interstate character of such traffic destroyed by placing the ownership of the pipe line in a different corporation in each state through which the oil passes in transportation, for the question of what is commerce among the states depends upon broader considerations than the time or place where the title passes.<sup>95</sup>

**§ 107. Pipe Line Companies Transporting Solely Their Own Oil, Common Carriers, When.** The Interstate

furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in Sec. 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be re-

garded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines itself."

95. In the Matter of Pipe Lines, 24 I. C. C. 1.

Commerce Act plainly includes only those corporations or persons who are in fact common carriers as distinguished from those engaged in a private business. A person does not become a common carrier unless he undertakes to transport for hire for those who choose to employ him. He must have committed himself to serve the public and he is not subject to legislative control as a carrier unless he undertakes to carry goods for all who choose to employ him. His undertaking must be public in character so that in case of his refusal to accept and carry the goods, he will be liable in an action for damages.<sup>96</sup> A law, therefore, which requires a corporation, engaged strictly in a private business, to become a common carrier is invalid. For example, a company simply drawing oil from its own wells across a state line to its own refinery for its own use is not and cannot be declared a common carrier within the meaning of the statute.<sup>97</sup>

But where pipe line companies are engaged in the transportation of oil from one state to another for the public in general provided the oil is sold to them before the transportation commences, they are common carriers in substance if not in form. A common carrier in fact cannot exempt itself from legislative control as such by requiring all prospective shippers to sell the commodity to it before beginning the transportation. Such a device is a most vicious kind of a monopoly and does not prevent the control of the Interstate Commerce Commission over such cases. After the passage of the amendment including pipe lines, the Interstate Commerce Commission instituted a proceeding to determine the status of pipe line companies throughout the country.<sup>98</sup>

The Commission held that the obligation of a com-

96. *Cownie Glove Co. v. Merchants' Dispatch Trans. Co.*, 130 Iowa 327, 4 L. R. A. (N. S.) 1060, 114 Am. St. Rep. 419, 106 N. W. 749; *Carpenter v. Baltimore & O. R. Co.*, 6 Pennw. (Del.) 15, 64 Atl. 252.

97. *United States v. Ohio Oil Co.* 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. 957.

98. *In the Matter of Pipe Lines*, 24 I. C. C. 1.

mon carrier was, by the Act, impressed upon a pipe line company engaged in the transportation of oil in interstate commerce although the pipe line was built over a privately acquired right of way and it transported only its own oil by pursuing a policy of refusing to receive oil from other parties except as a purchaser of such oil. An order was made requiring the operators of such pipe lines to file with the Commission schedules of their rates and charges for the transportation of oil in compliance with the statute.

Suits were brought to annul this order and the Commerce Court held that such pipe lines so transporting their own oil after sale, were, in fact, private, and not common carriers, and that, as thus construed, the amendment including such pipe lines was invalid in that it deprived them of their property without due process of law.<sup>99</sup>

On appeal to the national Supreme Court, the decision of the Commerce Court was reversed and the order of the Commission was sustained except as to one company which carried only the oil from its own wells to its own refinery.<sup>1</sup> "Availing itself of its monopoly of the means of transportation," said the Court in the case cited, "the Standard Oil Company refused through its subordinates to carry any oil unless the same was sold to it or to them and through them to it on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them and carried across half the continent a great subject of international commerce coming from many owners but, by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line. Taking up first the construction of the statute, we think it plain that it was intended to reach the combination of pipe lines that we

99. *Prairie Oil & Gas Co. v. Co.*, 224 U. S. 548, 58 L. Ed. 1459, United States, 204 Fed. 798. 34 Sup. Ct. 957.

1. *United States v. Ohio Oil*

have described. The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Company and its cooperating companies were not so engaged no one was. It not only would be a sacrifice of fact to form but would empty the act if the carriage to the seaboard of nearly all the oil east of California, were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers. That is the plain meaning as has been held with regard to other statutes similarly framed. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 195, 203. Its evident purpose was to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price. The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the States we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. *Rearick v. Pennsylvania*, 203 U. S. 507, 512. See *Texas & New Orleans R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111. The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that



make it transportation within the act. The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees if they carry must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. *Hoke v. United States*, 227 U. S. 308, 323. *Lottery Case*, 188 U. S. 321, 357."

**§ 108. Assumption of National Control over Interstate and Foreign Cable, Telephone and Telegraph Companies.** Intercourse between the states by telephone and telegraph constitutes interstate commerce.<sup>2</sup> Companies

2. **United States.** *Western U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *Chesapeake & P. Tel. Co. v. Manning*, 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. 881; *Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U. S. 761, 43 L. Ed. 1162, 19 Sup. Ct. 778; *Western U. Tel. Co. v. James*, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934; *Primrose v. Western U. Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. 1098; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 38 L. Ed. 871, 14 Sup. Ct. 1094; *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92, 37 L. Ed. 380, 13 Sup. Ct. 485; *Western U. Tel. Co. v. Seay*, 132 U. S. 472, 33 L. Ed. 409, 10 Sup. Ct. 161; *Leloup v.*

engaged in the telegraph and telephone business, whose lines extend from one state to another, are engaged in interstate commerce, and messages passing from one state to another constitutes such commerce. Such companies and messages; therefore, may be regulated by Congress.<sup>3</sup>

The amendment of 1910 to the Interstate Commerce Act extended its provisions to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States, to any other state, territory or district of the United States, or to any foreign country, and the statute declared them to be common carriers within the meaning and purpose of the act; but provided that messages by telegraph, telephone or cable

Port of Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380; *Rat-terman v. Western U. Tel. Co.*, 127 U. S. 411, 32 L. Ed. 229, 8 Sup. Ct. 1127; *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Western U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

**Maine.** *Haskell Implement & Seed Co. v. Postal Tel.-Cable Co.*, 114 Me. 277, 96 Atl. 219.

**Massachusetts.** *Western U. Tel. Co. v. Foster*, 224 Mass. 365, 113 N. E. 192.

**Missouri.** *Jacobs v. Western U. Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31; *Poor v. Western U. Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28; *Reed v. Western U. Tel. Co.*, 56 Mo. App. 168.

**Nebraska.** *Western U. Tel. Co. v. City of Fremont*, 43 Neb. 499, 26 L. R. A. 706, 61 N. W. 724.

**New Jersey.** *Ames v Kirby*, 71 N. J. L. 442, 59 Atl. 558.

**Virginia.** *Western U. Tel. Co. v. Bolling*, 120 Va. 413, 91 S. E.

154; *Western U. Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91; *Western U. Tel. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225; *Western U. Tel. Co. v. Tyler*, 90 Va. 297, 44 Am. St. Rep. 910, 18 S. E. 280.

3. **United States.** *Western U. Tel. Co. v. Brown*, 234 U. S. 542, 58 L. Ed. 1457, 34 Sup. Ct. 955, 5 N. C. C. A. 1024; *Western U. Tel. Co. v. Crovo*, 220 U. S. 364, 55 L. Ed. 498, 31 Sup. Ct. 399; *Western U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 54 L. Ed. 1088, 31 Sup. Ct. 59, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *Western U. Tel. Co. v. Pendleton*, 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. 1126; *Western U. Tel. Co. v. State*, 105 U. S. 460, 26 L. Ed. 1067.

**Arkansas.** *Western U. Tel. Co. v. Stewart*, 120 Ark. 631, 179 S. W. 813; *Western U. Tel. Co. v. Johnson*, 115 Ark. 564, 171 S. W. 859; *Western U. Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946.

**Mississippi.** *Western U. Tel. Co. v. Showers*, 112 Miss. 411, 73 So. 276.

subject to the provisions of the act, might be classified into day, night, repeated, unrepeatd, letter, commercial, press, government and such other classes as were just and reasonable, and different rates might be charged for the different classes of messages, and provided further that nothing in the act should be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of service.

Since the inclusion of these companies within the exclusive jurisdiction of the Interstate Commerce Commission as to all interstate messages, the reasonableness of rules adopted by them as to interstate messages is a question which must be raised and determined primarily by the Interstate Commerce Commission before it can be considered by the courts.<sup>4</sup> Messages between points in the same state, but passing in transmission in part over the territory of another state, constitute interstate commerce under analogous rulings as to interstate shipments of goods,<sup>5</sup> though two state courts have held

**Oklahoma.** *Western U. Tel. Co. v. Kaufman*, — Okla. —, 162 Pac. 708; *Western U. Tel. Co. v. Bank of Spencer*, — Okla. —, 156 Pac. 1175.

**Texas.** *Western U. Tel. Co. v. Smith*, — Tex. Civ. App. —, 188 S. W. 702; *Western U. Tel. Co. v. Schoonmaker*, — Tex. Civ. App. —, 181 S. W. 263.

**Virginia.** *Western U. Tel. Co. v. Bolling*, 120 Va. 413, 91 S. E. 154; *Western U. Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91.

4. **United States.** *Gardner v. Western U. Tel. Co.*, 145 C. C. A. 399, 231 Fed. 405; *H. B. Williams, Inc., v. Western U. Tel. Co.*, 203 Fed. 140.

**Arkansas.** *Western U. Tel. Co. v. Holder*, 117 Ark. 210, 174 S. W. 552; *Western U. Tel. Co. v. Simpson*, 117 Ark. 156, 174 S. W. 232; *Western U. Tel. Co. v. John-*

*son*, 115 Ark. 564, 171 S. W. 859; *Western U. Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946.

**Maine.** *Haskell Implement & Seed Co. v. Postal Tel.-Cable Co.*, 114 Me. 277, 96 Atl. 219.

**Missouri.** *Jacobs v. Western U. Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31.

**North Carolina.** *Meadows v. Postal Telegraph & Cable Co.*, 173 N. C. 240, 91 S. E. 1009.

**Oklahoma.** *Western U. Tel. Co. v. Orr*, — Okla. —, 158 Pac. 1139.

**Virginia.** *Western U. Tel. Co. v. Bolling*, 120 Va. 413, 91 S. E. 154.

**Wisconsin.** *Durre v. Western U. Tel. Co.*, 165 Wis. 190, 161 N. W. 755.

5. *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; *Wes-*



that such telegrams do not constitute interstate messages.<sup>6</sup>

As the Interstate Commerce Commission has acquired control of the interstate business of telegraph, telephone and cable companies, all state laws penalizing such carriers for negligence for a failure to deliver such messages, are invalid.<sup>7</sup> A limitation of \$50.00 as the company's liability for negligence for failure to deliver an interstate message has been held to be valid since the 1910 amendment, for the reason that such a limitation was fixed by the company's tariff filed with the Interstate Commerce Commission.<sup>8</sup> A stipulation on the back of an interstate telegram that the company shall not be liable for mistakes in an unrepeatd message beyond the amount received for sending the same, is binding upon state courts since the assumption of control over telegraph companies by the Interstate Commerce Commission.<sup>9</sup> But the Texas Supreme Court has held that a

tern U. Tel. Co. v. Kaufman, — Okla. — 162 Pac. 708.

"Upon principle we cannot conceive how any different doctrine can be applied to telegraphic messages between points within the state, which in the course of their transmission pass without the state into any other state or the district of Columbia. We conclude, therefore, that under the authorities the message involved herein was interstate commerce." Prentis, J., in Western U. Tel. Co. v. Bolling, — Va. —, 91 S. E. 154.

6. *Leavel v. Western U. Tel. Co.*, 116 N. C. 211, 27 L. R. A. 483, 47 Am. St. Rep. 798, 21 S. E. 391; *Railroad Com'rs v. Western U. Tel. Co.*, 113 N. C. 213, 22 L. R. A. 570; 18 S. E. 389; *Western U. Tel. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225; *Western U. Tel. Co. v. Reynolds*, 100 Va. 459, 93 Am. St. Rep. 971, 41 S. E. 856. The courts in these cases followed the case of

*Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. Ed. 672, 12 Sup. Ct. 806.

7. *Arkansas. Western U. Tel. Co. v. Simpson*, 117 Ark. 156 S. W. 232.

*Kansas. Kirsch v. Postal Tel. Cable Co.*, 100 Kan. 250, 164 Pac. 267.

*Oklahoma. Western U. Tel. Co. v. Kaufman*, — Okla. —, 162 Pac. 708.

*Texas. Western U. Tel. Co. v. Smith*, — Tex. Civ. App. —, 188 S. W. 702.

*Virginia. Western U. Tel. Co. v. First Nat. Bank of Berryville*, 116 Va. 1009, 83 S. E. 424; *Western U. Tel. Co. v. Bilisoly*, 116 Va. 562, 82 S. E. 91.

8. *Western U. Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946; *Western U. Tel. Co. v. Showers*, 112 Miss. 411, 73 So. 276.

9. *Poor v. Western U. Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28.



stipulation limiting liability for negligence to \$50.00 in the transmission and delivery of a telegram, was void even as to interstate messages, and that a recovery may be permitted for mental anguish under a state statute for a failure to deliver an interstate message.<sup>10</sup> The decision of the Texas court in permitting a recovery for mental anguish due to a failure to deliver an interstate telegram, seems to be in conflict with a controlling decision of the national Supreme Court.<sup>11</sup> Whether the provision on the back of a message limiting the amount of liability to \$50.00 is reasonable or unreasonable, is a question that must primarily be submitted to the Interstate Commerce Commission.<sup>12</sup> Similar provisions in tariffs and contracts of railroad and express companies have been held to be valid as to interstate shipments of goods.<sup>13</sup> A Missouri court held that the rule permitting a railroad company to recover the freight rate in its tariff filed with the Interstate Commerce Commission though the agent erroneously quoted a lower rate,

10. *Western U. Tel. Co. v. Bailey*, 108 Tex. 427, 196 S. W. 516. The same case was before the Texas Court of Civil Appeals and is reported in 171 S. W. 839 on the first appeal, and in 184 S. W. 519 on the second appeal.

Damages for mental anguish due to a negligent failure to transmit and deliver a telegram from a point in one state to a point in another, are not recoverable since the amendment of 1910 to the Interstate Commerce Act. *Norris v. Western U. Tel. Co.*, — N. C. —, 93 S. E. 465.

11. *Western U. Tel. Co. v. Brown*, 234 U. S. 542, 58 L. Ed. 1457, 34 Sup. Ct. 955, 5 N. C. C. A. 1024. See also *Western U. Tel. Co. v. Stewart*, 120 Ark. 631, 179 S. W. 813; *Western U. Tel. Co. v. Johnson*, 115 Ark. 564, 171 S. W. 859; *Jacobs v. Western U. Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31; *Western U. Tel. Co. v. Bolling*, 120 Va. 413, 91 S. E. 154.

12. *Gardner v. Western U. Tel. Co.*, 145 C. C. A. 399, 231 Fed. 405; *H. B. Williams, Inc., v. Western U. Tel. Co.*, 203 Fed. 140.

13. *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 953; *Missouri, K. & T. R. Co. v. Harri-man*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. 9. (N. S.) 257.

did not apply to the charges made by an operator for a telegraph company; but the message before the court in that case was an intrastate telegram.<sup>14</sup>

The Interstate Commerce Commission refused to assume jurisdiction of a complaint of undue discrimination against a local telephone company at Pittsburgh, Pa., for the reason that the messages involved were solely intrastate in character.<sup>15</sup> In another case, the Commission held that the rates charged by a telegraph company for messages between New York and San Francisco and by cable from New York to England were reasonable and nondiscriminatory.<sup>16</sup> It is the duty of telegraph companies, the Commission has held, to distinguish the classes of messages mentioned in the statute, and to adopt just and reasonable rules relating thereto.<sup>17</sup>

The new duties and liabilities of telegraph companies as to interstate messages since the assumption of federal control, were well and clearly stated by one court, as follows:<sup>18</sup> "The suit is based upon the violation of defendant's public duty to correctly transmit and deliver the message. This public duty, arising upon the creation of the contract of transmission, the defendant owed the sendee, even though the latter was not an immediate party to the contract. Hence plaintiff, as sendee, has a right of action based upon the violation of that public duty. *Western Union Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386; *State Bank of Commerce v. Western Union Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; *Bailey v. Western Union Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *Western Union Tel. Co. v. Holder*, 117 Ark. 210, 174 S. W. 552; *Eureka Cotton Mills Co. v. Western*

14. *Higbee v. Western U. Tel. Co.*, 179 Mo. App. 195, 166 S. W. 825.

15. *Local Commercial Telephone Service in Pittsburgh, Pennsylvania*, 27 I. C. C. 622.

16. *White v. Western U. Tel. Co.*, 23 I. C. C. 500.

17. *White v. Western U. Tel. Co.*, 33 I. C. C. 500.

18. *Trimble, J., in Poor v. Western U. Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28.

Union Tel. Co., 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273; *Western Union Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629, 65 South 962; *Western Union Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 420, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815. The telegram, being from a point in Kansas to a point in Missouri, was an interstate message, and its transmission was an act of interstate commerce. *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 7 Supt. Ct. 1126, 30 L. Ed. 1187. Section 7 of the Act of Congress of June 18, 1910 (36 Stats. L. 544, c. 309; Fed. Stats. Ann. 1912, vol. 1, p. 111 (U. S. Comp. St. 1916, sec. 8563), amending section 1 of the original Interstate Commerce Act (24 Stats. L. 379, c. 104; 3 Fed. Stats. Ann. 809), as amended by the Act of June 29, 1906 (34 Stats. L. 584, c. 3591; Fed. Stats. Ann. 1909 Supp. p. 255), known as the 'Hepburn Act' with the 'Carmack Amendment' thereto, declares that telegraph companies engaged in sending messages from one state to another state 'shall be considered and held to be common carriers within the meaning and purpose of this act,' i. e., within the meaning and purpose of the entire Interstate Commerce Law as it then existed. Being therefore a common carrier within the meaning of the Interstate Commerce Statutes, and engaged in interstate commerce with respect to the particular message in controversy, the defendant telegraph company is subject to and governed by the federal law as expounded and applied by the federal courts to the exclusion of all state laws and decisions. Undoubtedly, it is well established that the liability of common carriers of property, for any violation of their public duty in interstate shipments or carriage, is governed wholly by the federal statutes relating thereto and by the rules of decision observed by the federal courts in construing such statutes and in applying the general principles of law to the questions of liability. This has been decided so frequently of late years that it is hardly necessary to cite even a few of the many cases announcing that

doctrine. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Missouri, etc., R. Co. v. Harriman*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; *Hamilton v. Chicago, etc., R. Co.*, 177 Mo. App. 145, 164 S. W. 248; *Kent v. Chicago, etc., R. Co.*, 189 Mo. App. 424, 176 S. W. 1105. But plaintiff contends that Congress has not legislated upon the subject of the liability of telegraph companies nor upon the measure of damages governing in a suit in tort, and that therefore such matters are not controlled by federal legislation and rules of decision. It is true, the Carmack Amendment to the Hepburn Act dealt with the liability of common carriers transporting property. And it is also true that section 6 of the Commerce Act (U. S. Comp. St. 1916, sec. 8569), requiring common carriers subject to the provisions of said act to file with the Interstate Commerce Commission schedules of its rates, fares, and charges for the transportation of passengers and property, is held not to apply to telegraph companies. 25 An. Rep. I. C. C. 1911, p. 5; Conf. Rul. No. 305. But sections 1, 3, 15, and 20 of the Interstate Commerce Law do apply to such companies. Section 1, as stated before, makes the act applicable to telegraph companies engaged in transmitting messages from one state to another, and requires that all charges for services rendered shall be just and reasonable, and all unjust and unreasonable charges are declared to be unlawful; and it further provides that messages 'may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.' Section 3 provides for uniformity of charges for the different classes of service by making it unlawful to give preferences or advantages in any respect whatsoever. Section 15 provides that upon complaint being made to the Interstate Commerce Commission that any rate or classification, regulation, or practice whatsoever



of common carriers subject to the act, including telegraph companies, the commission shall have power to declare what rate, or practice, or regulation is reasonable, and to forbid those found to be unjust, and to require the companies to adopt the one prescribed. Section 20 also covers the matter of making reports and keeping accounts. The Commerce Commission in its 24th. An. Rep. p. 82, says: 'The administration of the twentieth section of the Act to regulate commerce, so far as telegraph companies are concerned, gives rise to no very serious difficulty.' It is therefore apparent that the interstate commerce statutes clearly bring interstate telegraph companies within the terms and subject to all the provisions of the Interstate Commerce Law so far as applicable thereto; and that such companies are allowed the privilege of making their rates, classifications, and charges subject to the power of the Interstate Commerce Commission to revise them upon complaint, and subject to the law's requirement that they shall be reasonable and uniform for the same service and classification (*White & Co. v. Western Union Tel. Co.*, 33 *Interst. Com. Com'n*, R. 500, which was duly offered in evidence and is shown in the abstract). So that the above-named federal laws constitute an assertion of the power of Congress over the subject of interstate telegrams and the duties of companies engaged in transmitting them. And this assertion of power over them expressly provides for uniformity of rate, of classification, and of service; and necessarily of responsibility therefor. In so doing, state action and rules are excluded. These principles are clearly announced in and deducible from the cases of *Atchison, etc. R. Co. v. Harold*, 241 U. S. 371, 36 *Sup. Ct.* 665, 60 *L. Ed.* 1050; *Southern Railway Co. v. Prescott*, 240 U. S. 632, 36 *Sup. Ct.* 469, 60 *L. Ed.* 836. See, also, *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 34 *Sup. Ct.* 635, 58 *L. Ed.* 1062, *L. R. A.* 1915C, 1 *Ann. Cas.* 1915B, 475; *Cleveland, etc., R. Co. v. Dettlebach*, 239 U. S. 588, 36 *Sup. Ct.* 177, 60 *L. Ed.* 453; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 36 *Sup. Ct.* 140, 56 *L. Ed.* 257. From all of which it

follows that the rule of decision heretofore in force in this state respecting the force and effect of provisions in the contract by which a message is transmitted are no longer controlling with respect to interstate messages. They are to be given the effect accorded by the federal laws and decisions. *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, 145 C. C. A. 399; *Western Union Tel. Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457; *Haskell Implement, etc., Co. v. Postal Tel., etc. Co.*, 114 Me. 277, 96 Atl. 219; *Western Union Tel. Co. v. Bank of Spencer (Okl.)* 156 Pac. 1175; *Western Union v. Bilisoly*, 116 Va. 562, 82 S. E. 91; *Western Union Tel. Co. v. First National Bank of Berryville*, 116 Va. 1009, 83 S. E. 424; *Durre v. Western Union Tel. Co. (Wis.)* 161 N. W. 755; *Meadows v. Postal, etc., Co. (N. C.)* 91 S. E. 1009; *Kirsch v. Postal Tel. Cable Co. (Kan.)* 164 Pac. 267. The message, an order to buy, was changed in an important particular, and, since everything surrounding the change is wholly within the knowledge of the company and it has not seen fit to throw any light upon the matter, the proof is sufficient to make out a *prima facie* case of at least the 'ordinary negligence' spoken of by the federal courts, for which the stipulation on the back of the telegram limiting liability provides. *Williams v. Western Union Telegraph Co. (D. C.)* 203 Fed. 140, 144; *Jones v. Western Union Telegraph Co. (C. C.)* 18 Fed. 717. Since the case is governed wholly by the federal rules of decision, and since they uphold the validity of the stipulations set out on the back of the telegraph blank limiting liability for incorrect transmission, plaintiff's recovery must be limited by the provision applicable thereto. That provision is that the company shall not be liable for a mistake in the transmission of any unrepeatd message beyond the amount received for sending the same. There is here no distinction as to whom such limitation shall apply, whether to sender or sendee. And while the latter is not directly a party to the contract for transmission, yet his rights are drawn from and are limited by that contract. *Gardner v. Western Union Tel. Co.*, 231 Fed.

405, 145 C. C. A. 399; *Findlay v. Western Union Tel. Co.* (C. C.) 64 Fed. 459; *Whitehill v. Western Union Tel. Co.* (C. C.) 136 Fed. 499; *Western Union Tel. Co. v. Bank of Spencer (Okl.)* 156 Pac. 1178; *McGehee v. Western Union Tel. Co.*, 169 Ala. 109, 53 South. 205, Ann. Cas. 1912B, 512. Nor is the question of the reasonableness or of the real purpose and effect of such a limitation open to our consideration, since that is a matter for the Interstate Commerce Commission to pass upon. *Gardner v. Western Union Tel. Co.*, 231 Fed. 405, 409, 145 C. C. A. 399; *Williams v. Western Union Tel. Co.* (D. C.) 203 Fed. 150; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 23 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Baltimore, etc., R. Co. v. U. S. ex. rel. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 121, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915D, 450, Ann. Cas. 1915D, 593; *Durre v. Western Union Tel. Co. (Wis.)* 161 N. W. 755. However much one may be convinced that a stipulation limiting liability to the cost of the message is not a limitation of, but an absolute exemption from, liability for negligence, nevertheless the case must be determined according to the rules of decision laid down by the federal courts, and they have held that such provision is not an exemption from liability. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 16, 14 Sup. Ct. 1098, 38 L. Ed. 883. And the facts of the case with regard to the negligence shown make the provision limiting the damages to the cost of the message applicable under the federal rule. *Haskell, etc., Seed Co. v. Postal Union Tel. Co. v. Simpson*, 117 Ark. 156, 174 S. W. 232; *Western Union Tel. Co. v. Orr (Okl.)* 158 Pac. 1139; *Boyce v. Western Union Tel. Co.*, 119 Va. 14, 89 S. E. 106; *Meadows v. Postal Tel. & C. Co. (N. C.)* 91 S. E. 1009."

**§ 109. Independent Express Companies Included by Hepburn Amendment of 1906.** Under the original act express business carried on by a railroad company was



subject to the statute;<sup>19</sup> but independent express companies were not subject to the act until the passage of the amendment of 1906,<sup>20</sup> when the term "common carrier" as used in the act was declared by the statute to include express companies.

These companies now stand, with reference to the Act and its several provisions and amendments, as though they had been mentioned in the original act. With respect to all the provisions of the statute, they are in the same attitude as railroads except in so far as the language of the act necessarily excludes them.<sup>21</sup> The exercise of this control by Congress over the interstate business of express companies invalidates state and municipal regulations relating thereto.<sup>22</sup> Joint stock associations conducting an interstate express business are within the purview of the statute and are subject to prosecution under Section 10 of the act prohibiting the collection of any sums in excess of the scheduled rates filed with the Interstate Commerce Commission.<sup>23</sup>

19. *Re Express Companies*, 1 I. C. R. 677.

20. *Southern Indiana Exp. Co. v. United States Express Co.*, 88 Fed. 659, affirmed in 35 C. C. A. 172, 92 Fed. 1022. *United States v. Morsman*, 42 Fed. 448.

21. *United States v. Wells-Fargo Exp. Co.*, 161 Fed. 606; *Kindel v. Adams Exp. Co.*, 13 I. C. C. 475.

22. *Barrett v. New York*, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203, in which Mr. Justice Hughes said: "The right of public control, in requiring such a license, is asserted by virtue of the character of the employment, but while such a requirement may be proper in the case of local or intrastate business, it cannot be justified as a prerequisite to the conduct of the business that is interstate. Not only is the latter protected from the action of the State, either directly or through its municipi-

palities, in laying direct burdens upon it, but, in the present instance, Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves."

23. *United State v. Adams Exp. Co.*, 229 U. S. 381, 57 L. Ed. 1237, 33 Sup. Ct. 878. "It has been notorious," said the Court, "for many years that some of the great express companies are organized as joint stock associations, and the reason for the amendment hardly could be seen unless it was intended to bring those associations under the act. As suggested in the argument for the Government, no one, certainly not the defendant, seems to have doubted that the statute now imposes upon them the duty to file schedules of rates. *American Express Co.*



A railroad company not otherwise subject to the act, subjects itself to the jurisdiction of the Interstate Commerce Commission and the provisions of the statute if it transports express matter for an express company that is subject to the act.<sup>24</sup> The Carmack amendment, requiring all common carriers to issue a bill of lading and making them liable for loss or damage on lines of connecting carriers, applies to express companies.<sup>25</sup> The Supreme Court once held<sup>26</sup> that express companies under the provisions of Section 6 and Section 3, of the Elkins Act were prohibited from giving franks, that is, free transportation of personal baggage, to their employes and members of their families, and to officers and employes of other carriers and members of their families in exchange for passage issued by the transportation companies; but the effect of this decision was nullified by an amendment to Section 1 in 1910 which provides that the provision prohibiting free transportation shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employes, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employes and their families of other common carriers subject to the provision of the statute.

Since it has acquired jurisdiction over independent express companies, the Interstate Commerce Commission has frequently been called upon to adjust complaints against them and to adopt rules and regulations governing the transportation of interstate shipments.<sup>27</sup>

v. United States, 212 U. S. 522, 531. (The American Express Company is a joint stock association). But if it imposes upon them the duties under the words common carrier as interpreted, it is reasonable to suppose that the same words are intended to impose upon them the penalty inflicted on common carriers in case those duties are not performed."

24. Conference Rulings, Nos. 197, 368, of Interstate Commerce

1 Control Carriers 17

Commission.

25. Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; Adams Exp. Co. v. Croninger, 262 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257.

26. American Exp. Co. v. United States, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315.

27. In Re Express Rates, Practices, Accounts and Revenues, 35 I. C. C. 3; Lindsay & Co. v. North-

A railroad company, it has been held, may contract to give one express company the exclusive right to transport express over its line to the exclusion of all other companies.<sup>28</sup>

§ 110. **Sleeping Car Companies Placed Under Jurisdiction of Commission by Hepburn Act of 1906.** Sleeping car companies do not assume or require the status of common carriers of passengers by furnishing sleeping cars to be used by the traveling public under a contract with a railroad company unless they are declared to be common carriers by some statutory provision. They perform an auxiliary function in the transportation of passengers and are engaged in a public calling, but not as common carriers.<sup>29</sup> Their status as carriers is, in some respects, analogous to private car owners leasing freight cars to railroad companies. These owners are not, it has been held, common carriers.<sup>30</sup>

Under the original act, therefore, sleeping car companies were not under the jurisdiction of the Interstate Commerce Commission though if a railroad company furnished the sleeping cars, the rates charged for accommodation therein were subject to the control of the Commission. By the Hepburn Amendment of 1906 to Section 1 of the Act, sleeping car companies were specifically included within the term "common carrier" as used in the statute. Since that time the Commission has, in several cases, investigated and determined upon

ern Exp. Co., 33 I. C. C. 394; Brackett Co. v. Great Northern Exp. Co., 29 I. C. C. 667; Railroad Com'rs of Florida v. Southern Exp. Co., 28 I. C. C. 634; Acme Portland Cement Co. v. American Exp. Co., 28 I. C. C. 316; Atlantic Packing Co. v. American Exp. Co., 28 I. C. C. 244; In re Express Rates, 28 I. C. C. 132; Parlin & Orendorff Plow Co. v. United States Exp. Co., 26 I. C. C. 561; In

Re Express Rates, Practices, Accounts and Revenues, 24 I. C. C. 380.

28. Express Cases, 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628.

29. Pullman Co. v. Linke, 203 Fed. 1017; Lemon v. Pullman Palace Car Co., 52 Fed. 262.

30. Ellis v. Interstate Commerce Commission, 237 U. S. 434, 59 L. Ed. 1036, 35 Sup. Ct. 645.

the reasonableness of specific rates charged by such sleeping car companies.<sup>31</sup>

A statute of the state of Wisconsin, passed in 1911, required the upper berth of a section in a sleeping car to be closed whenever a person engaged a lower berth and the upper berth of the same section was not at the same time engaged or occupied. This statute was held invalid by the Supreme Court of the United States as a taking of the property of the railroad without due process of law in violation of the federal constitution.<sup>32</sup> The question whether the statute was a direct interference with interstate commerce and in conflict with the rates and regulations filed with the Interstate Commerce Commission was raised by the railroad company in the case but was not decided by the court. "A sleeping car may not be an 'inn on wheels,' " said the court, "but the operating company does not engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public. The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management or the taking of the carrier's property without compensation."

§ 111. **Receivers and Purchasers Pendente Lite.** Receivers of common carriers by railroad are common carriers within the meaning of the Act and are subject to the regulations thereof.<sup>33</sup> Orders of the Interstate Com-

31. *Commerce Club of Sioux Falls v. Pullman Co.*, 31 I. C. C. 664; *Corporation Commission of Oklahoma v. Atchison, T. & S. F. Ry. Co.*, 25 I. C. C. 120.

*v. State*, 238 U. S. 491, 59 L. Ed. 1423, 35 Sup. Ct. 869, L. R. A. 1916A 1133.

33. *Independent Refiners' Association v. Western New York & P. R. Co.*, 6 I. C. R. 378.

32. *Chicago, M. & St. P. R. Co.*



merce Commission made pursuant to the statute are also binding upon purchasers of the railroad property.<sup>34</sup>

**§ 112. Railroad Companies Incorporated in Foreign Countries and Engaged in Interstate Commerce.** The provisions of the Interstate Commerce Act apply to railroad companies incorporated in foreign countries as to their traffic within the United States. Such carriers, for instance, as the Grand Trunk System and the Canadian Pacific Company are under the jurisdiction of the Interstate Commerce Commission while engaged in interstate or foreign commerce in the United States and must conform to all the rules and regulations that govern companies incorporated in the United States. This rule was enforced by the Interstate Commerce Commission when it held that the Grand Trunk Railway Company had violated Section 6 of the Act in charging less than the published rate for shipments from points in the State of New York to cities in Canada.<sup>35</sup>

**§ 113. Statute Applies to Individuals and Partnerships as Well as Incorporated Companies.** The Act to Regulate Commerce applies "to any corporation or any person or persons" engaging in the transportation of passengers or property from a point in one state to a point in another. In some of the states, the law permits only incorporated companies to act as common carriers, and as a matter of fact and practice, common carriers by rail are usually incorporated companies.

But in view of this statutory definition of interstate carriers subject to federal control, it follows that incorporation is not a condition precedent to the right to be a common carrier. That relation to the public may lawfully be sustained with respect to interstate traffic by individuals or partnerships or other associations.<sup>36</sup>

34. Interstate Commerce Commission v. Western New York & P. R. Co., 82 Fed. 192.

Grand Trunk Ry. Co., 2 I. C. R. 496.

36. Tap Line Case, 23 I. C. C.

35. In Re Investigation of 277.



A boat line, therefore, owned by an individual, is not, for that reason, to be deprived of the right to have through routes and joint rates established with connecting railway companies.<sup>37</sup>

37. *Truckers Transfer Co. v. Charleston & W. C. Ry. Co.*, 27 I. C. C. 275.

## CHAPTER VII

### SHIPMENTS AND TRANSPORTATION SERVICES CONTROLLED BY INTERSTATE COMMERCE ACT.

- Sec. 114. Constitutive Elements of Interstate Transportation Within the Act.
- Sec. 115. Illustrative Applications of the Foregoing Principles in Adjudicated Cases.
- Sec. 116. Shipments Between Two Points in Same State Passing Enroute Through Another State.
- Sec. 117. Absence of Definite Destination in Foreign Country or in Other State Immaterial.
- Sec. 118. Change of Destination in Transit as Affecting Interstate Character of Shipment.
- Sec. 119. Interstate Transportation Includes Receipt and Delivery of Traffic as well as Actual Carriage.
- Sec. 120. When Temporary Stoppage or Interruption Changes Interstate Character of Shipment into Intrastate and *Vice-Versa*.
- Sec. 121. When Interstate or Intrastate Character of a Shipment is not Changed by Temporary Stoppage or Interruption.
- Sec. 122. Sale and Delivery of Coal f. o. b. Cars at Mine for Transportation to Purchasers Outside the State.
- Sec. 123. Shipments from Points in One State to a Port of Transshipment in Same State for Export Included.
- Sec. 124. Shipments from One Foreign Country to Another Through the United States Beyond Control of Commission.
- Sec. 125. Regulation of Terminal Charges, Services and Facilities for Interstate Shipments.
- Sec. 126. Transportation Wholly Within One State Not Under Federal Control.
- Sec. 127. Transit Privileges Part of Transportation Under Control of Interstate Commerce Commission.
- Sec. 128. Regulation of Grain Elevation Service Under Federal Control.
- Sec. 129. Loading, Dunnage and Special Preparation of Freight Cars, for Shipments of Particular Commodities.
- Sec. 130. Weighing of Interstate Shipments of Freight Under Federal Control.
- Sec. 131. Regulations and Rules Concerning Baggage of Interstate Passengers Under Control of Commission.
- Sec. 132. Refrigeration, Ventilation and Icing of Property in Cars Part of Transportation Duties of Interstate Carriers.
- Sec. 133. Track Storage and Demurrage Charges in Connection with Interstate Shipments Under Control of Commission.
- Sec. 134. Wharves and Connecting Tracks of Interstate Carriers Public Facilities Under Federal Control.

- Sec. 135. Jurisdiction of Commission Over Port Switching Service Performed on Import Traffic.
- Sec. 136. Interstate Transportation by Land of Explosives and Other Dangerous Articles Under Federal Control.
- Sec. 137. Peddling Merchandise from Cars not Transportation Service Which Carriers may be Compelled to Furnish.
- Sec. 138. Terms "Railroad" and "Transportation" Defined by Statute.
- Sec. 139. Statute not Applicable to all Interstate Commerce.

**§ 114. Constitutive Elements of Interstate Transportation Within the Act.** Although Section 1 of the Act to Regulate Commerce defines the interstate transportation of persons and property subject thereto, as that which is moved from one state or territory to another state or territory, and excludes transportation wholly within one state and not shipped to another state or territory, the question whether a particular transaction constitutes interstate commerce has been the cause and source of much litigation.<sup>1</sup>

The interstate status of a shipment cannot be determined by the mere forms of billing or contract, but by the essential character of the commerce, that is, whether in fact there is a continuity of movement from a point in one state to a point in another. Whenever a commodity is delivered to a carrier for the purpose of being moved to another state, then the interstate character of that commodity has commenced and continues to the final place of destination until delivered to the consignee.<sup>2</sup>

1. Railroad Commission of Louisiana v. Texas & P. Ry. Co., 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; Susquehanna Coal Co. v. City of South Amboy, 228 U. S. 665, 57 L. Ed. 1015, 33 Sup. Ct. 712; Bacon v. People, 227 U. S. 504, 57 L. Ed. 615, 33 Sup. Ct. 299; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229; United States v. Union Stock Yard & Transit Co. of Chicago, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; Railroad Commission of Ohio v.

Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; Louisville & N. R. Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189; Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; General Oil Co. v. Grain, 209 U. S. 211, 52 L. Ed. 754, 28 Sup. Ct. 475.

2. Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. 456,

The interstate character of such a shipment cannot be destroyed by ignoring the point of origin and destination, separating the rate into parts and issuing local bills of lading for the shipment between two points in the same state, when it is, in fact, a continuous shipment from a point in one state to a point in another.

Section 7 of the Act declares that it shall be unlawful for any common carrier subject to the provisions of the Act to enter into any combination, contract or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination, and further provides that no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade the provisions of the statute.

The movement of a commodity, therefore, from a point in one state to a point in another must be regarded as an entirety and it takes character as interstate commerce when it is delivered to a carrier for the purpose of transportation to another state.<sup>3</sup>

59 L. Ed. 1406, 35 Sup. Ct. 896; Illinois Cent. R. Co. v. Louisiana R. R. Commission, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; United States v. Vaccaro Bros. & Co., 230 Fed. 943; United States ex rel. Attorney General v. Union Stockyard & Transit Co. of Chicago, 192 Fed. 330; Tompkins v. International Paper Co., 106 C. C. A. 529, 183 Fed. 773; Pacific Coast R. Co. v. United States, 98 C. C.

A. 31, 173 Fed. 448; United States v. Colorado & N. W. R. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893; Port Arthur Rice Milling Co. v. Texarkana & Ft. S. Ry. Co., 28 I. C. C. 697.

3. Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370; Illinois Cent. R. Co. v. De Fuentes, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; South



**§ 115. Illustrative Applications of the Foregoing Principles in Adjudicated Cases.** The rules enunciated in the preceding paragraph were illustrated and applied to particular shipments under the following circumstances: A shipment of lumber on local bills of lading from one point in Texas to another but destined for export to a foreign country and so intended at the time of shipment, was held not to be an intrastate shipment while moving between the two points in the same state.<sup>4</sup> The transportation of coal from one point in Ohio to

Covington & C. St. R. Co. v. City of Covington, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158, L. R. A. 1915F 792; Southern Pac. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475.

4. Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229, "The shipments having the character of foreign commerce," said the Court, "when they passed 'out through the port of Sabine,' when did they acquire it? We have had the occasion to express at what point of time a shipment of goods may be ascribed to interstate or foreign commerce, and decided it to be when the goods have actually started for their destination in another state or to a foreign country, or delivered to a carrier for transportation. \* \* \* That there must be a continuity of movement we may concede, and to a foreign destination intended at the time of the shipment. \* \* \* In the present case the Sabine Company was the manufacturer and shipped them to the Powell Company, the

purchaser, who paid the freight charges for the Sabine Company. Upon the arrival of the lumber at Sabine, it was carried without delay beyond and unloaded into the water in reach of a ship's tackle. The continuity of the shipment was not as much broken as in the cited case, \* \* \* The determining circumstance is that the shipment of the lumber was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading the commerce will be given local character, though it be essentially foreign."

another with the intention of reloading it into vessels on Lake Erie for shipment to other states or to Canada, was held to be interstate or foreign transportation.<sup>5</sup> A shipment of a commodity from St. Louis, Mo., to Leadville, Colo., which was moved by the first carrier to Pueblo, Colo., under one contract, and by another carrier from Pueblo to Leadville on a local bill of lading, although there was no through route or through rate established between St. Louis and Leadville, was an interstate movement throughout.<sup>6</sup> A movement of logs and staves from Alexandria to New Orleans, under local

5. *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653. The Court said: "It is contended that this transportation of the coal under the rate fixed by the Railroad Commission is not within the power and authority of the Interstate Commerce Commission under Section 1 of the Act to regulate commerce, which makes the provisions of the Act inapplicable to the transportation of property wholly within one state, and not shipped to or from a foreign country from or to a state or territory; and, furthermore, that a transportation of the character here in question is only within the jurisdiction of the Interstate Commerce Commission when it is a transportation partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; and therefore that the subject matter in question is left within the state jurisdiction. On the other hand, it is contended that this transportation is within the jurisdiction of the Commission under the Act to regulate commerce. It is enough to now hold, as we do, that the establishing of the rate

in question is an attempt to regulate interstate commerce and is therefore beyond the power of the state or a commission assuming to act under its authority. We therefore reach the conclusion that under the facts shown in this case the Railroad Commission, in fixing the rate of seventy cents for the transportation above described, attempted to directly regulate and control interstate commerce, and, for that reason, the enforcement of its order should be enjoined."

6. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641, in which the Court said: "The Denver and Rio Grande claimed in the record in the Court of Appeals that the order was void on its face for the reason that the Commission was without jurisdiction to pass upon the reasonableness of the rate from Pueblo, Colorado to Leadville, Colorado. But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate in-

bills of lading, providing for delivery at New Orleans to shipper's or consignee's order, but which in fact was intended by the shipper to be exported to foreign countries, constituted a foreign shipment within the meaning of the Interstate Commerce Act.<sup>7</sup>

§ 116. **Shipments Between Two Points in Same State Passing Enroute Through Another State.** If a commodity shipped from one point to another in one state passes in transit through another state, the transaction constitutes interstate commerce and is subject to the provisions of the Interstate Commerce Act.<sup>8</sup> Thus,

to its component parts and by charging local rates and issuing local way bills, attempting to convert an interstate shipment into intrastate transportation."

7. Railroad Commission of Louisiana v. Texas & P. R. Co., 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837. The only difference between interstate and foreign commerce is that one is destined for another state and the other for a foreign country. The principles in determining both are the same and decisions interpreting one are relevant in construing the other.

8. **United States.** Ewing v. City of Leavenworth, 226 U. S. 464, 57 L. Ed. 303, 33 Sup. Ct. 157; Hanley v. Kansas City Southern R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; United States v. Erie R. Co., 166 Fed. 352; United States v. Chicago Great Western Ry. Co., 162 Fed. 775; West Virginia Rail Co. v. Baltimore & O. R. Co., 26 I. C. C. 622; Board of Trade of Winston-Salem, N. C. v. Norfolk & W. R. Co., 26 I. C. C. 146; Baker Commercial Club v. Oregon-Washington R. & N. Co., 25 I. C. C. 281; Bridgeman-Russell Co. v. Great Northern Exp. Co., 22 I. C. C. 573.

**Arkansas.** St. Louis, I. M. & S. R. Co. v. Spriggs, 113 Ark. 118, 167 S. W. 96; St. Louis & S. F. R. Co. v. State, 87 Ark. 562, 113 S. W. 203.

**California.** Cowden v. Pacific Coast S. S. Co., 94 Cal. 470, 18 L. R. A. 221, 28 Am. St. Rep. 142, 29 Pac. 873.

**Idaho.** Crescent Brewing Co. v. Oregon Short Line R. Co., 24 Idaho, 106, 132 Pac. 975.

**Kansas.** Leibengood v. Missouri, K. & T. R. Co., 83 Kan. 25, 28 L. R. A. (N. S.) 985, 109 Pac. 988; Patterson v. Missouri Pac. R. Co., 77 Kan. 236, 15 L. R. A. (N. S.) 733, 94 Pac. 138.

**Kentucky.** Cincinnati, N. O. & T. P. R. Co. v. Goode, 155 Ky. 153, 159 S. W. 695; Louisville & N. R. Co. v. Allen, 152 Ky. 145, 153 S. W. 198.

**Maryland.** State v. Cumberland & P. R. Co., 105 Md. 478, 66 Atl. 458.

**Minnesota.** Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co., 110 Minn. 25, 19 Ann. Cas. 1088, 124 N. W. 819.

**Missouri.** Bowles v. Quincy, O. & K. C. R. Co., — Mo. App. —, 187, S. W. 131; Howard v. Chicago, R. I. & P. Ry. Co., — Mo.



traffic moving from one point to another in West Virginia but passing in transit for several hundred feet through the state of Kentucky, was held to be subject to the jurisdiction of the Commission.<sup>9</sup> And similarly a shipment between two points in the United States but pass-

App. —, 184 S. W. 906; Potter v. Kansas City Southern R. Co., 187 Mo. App. 56, 172 S. W. 1153; Deardorff v. Chicago, B. & Q. R. Co., 263 Mo. 65, 172 S. W. 333; Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 S. W. 1052.

Oklahoma. Western U. Tel. Co. v. Kaufman, — Okla. —, 162 Pac. 708.

Texas. Wichita Falls & W. Ry. Co. of Texas v. Asher, — Tex. Civ. App. —, 171 S. W. 1114.

9. West Virginia Rail Co. v. Baltimore & O. R. Co., 26 I. C. C. 622, in which the Commission said: "Complainant's shipments moved via the Baltimore & Ohio Railroad from Huntington to Kenova, W. Va., a distance of 8 miles, and thence over the Norfolk & Western Railway to the points of destination. The Norfolk & Western Railway Company, which assumed the burden of the defense, contends that transportation from points in West Virginia to destinations in the same state is not within the jurisdiction of the Commission, although for a short distance, about 1,500 feet, the traffic moves through the state of Kentucky. It asks that the Commission reconsider its opinions in the cases of New Orleans Cotton Exchange v. C., N. O. & T. P. Ry. Co., 2 I. C. C., 375; Milk Producers Protective Asso. v. D., L. & W. R. R. Co., 7 I. C. C., 92; and Wells-Higman Co. v. St. L., I. M. & S. Ry. Co., 18 I. C. C., 175, to the effect that such transportation as is here involved is within

the scope of the act. It is pointed out that while the Supreme Court of the United States, in Hanley v. K. C. S. Ry. Co., 187 U. S., 617, has held that transportation, when the points of origin and destination are in the same state, is interstate commerce 'where a large part of the route is outside of the state,' it has not held it to be *interstate commerce subject to the provisions of the act*; that whether it is subject to the act is a question on which the Supreme Court has not spoken the final word and on which the lower federal courts are divided; that this question is answered in the affirmative in United States v. D., L. & W. R. R. Co., 152 Fed. 269; and that it is answered in the negative in United States ex rel. Kellogg v. L. V. R. R. Co., 115 Fed. 373. In this case it appears that shipments from Huntington to the point of destination in West Virginia pass outside the state of West Virginia into Kentucky for about 1,500 feet, the most of which distance is covered by a tunnel. The Norfolk & Western asserts that there never is any stoppage in transit of traffic moving over the 1,500 feet; and there is no place for the delivery of freight and that the mere incident of its passing over the 1,500 feet is not sufficient to bring the transportation between West Virginia points within the scope of the act. We are of the opinion, however, that shipments from Huntington to points in West Virginia here un-



ing in transit through the Dominion of Canada is an interstate shipment within the control of the Commission.<sup>10</sup>

The transportation of stock from a point in Missouri to stock yards at Kansas City, Mo., the place for unloading the stock being over the line in Kansas from which point the stock were driven back into the yards in Missouri, was held to be an interstate shipment.<sup>11</sup> "The simplest forms of interstate shipments," said Judge Woodson, in the last case cited, "within the meaning of the commerce clause of the Constitution of the United States are those which consist of the shipment of some article of commerce designed from the initial point of shipment in one state in the Union, to be carried to another point in another state thereof, by means of one and the same common or private carrier or by different carriers, public or private. This definition covers the case at bar, as a glove covers a hand, as shown by the authorities to be presently cited, for the reason that it was the intention and agreement of both parties to the contracts of shipment here involved, that the live stock should be transported from Hale, Mo., to the unloading chutes of the Kansas City Stock Yards Company, which, as before stated, were situated in the state of Kansas. The mere fact that after the stock had been transported into the state of Kansas and there unloaded and was then driven from there, on foot, back across the state line into the state of Missouri, had no effect whatever upon the character of the shipments made by the railroad company."

**§ 117. Absence of Definite Destination in Foreign Country or in Other State Immaterial.** If a commodity is delivered to a carrier for transportation to another state or country, and the transportation is actually be-

der consideration are subject to the act to regulate commerce and adhere to our previous rulings upon this question."

10. American Agriculture Chem-

ical Co. v. Bangor & A. R. Co., 28 I. C. C. 298.

11. Deardorff v. Chicago, B. & Q. R. Co., 263 Mo. 65, 172 S. W. 333.

gun, the interstate or foreign character, as the case may be, of such a shipment is not affected by the absence of a definite destination in the other state or country.<sup>12</sup>

**§ 118. Change of Destination in Transit as Affecting Interstate Character of Shipment.** When goods are moving in interstate commerce, that is, from a point in one state to a point in another, a change of the final destination in transit will not affect the interstate character of the shipment. For example, a carload of freight was shipped from Crescent, Okla., destined to Hill City, Kan., but at Salina, Kan., a point in transit, the destination of the car was changed to Buffalo Park, Kas. Under these facts the court properly held that the movement from Salina to Buffalo Park was a part of the interstate transportation commencing at Crescent, Okla.<sup>13</sup>

A car of corn was shipped from Yanka, Neb., and was consigned to Topeka, Kan., to the order of the consignor, with a direction on the bill of lading to notify a grain company at Kansas City, Mo. A draft for the purchase price was sent to the Kansas City firm accompanied by a bill of lading. Upon the presentation of this draft, the grain company at Kansas City, Mo.,

12. Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229, in which Mr. Justice McKenna said: "Nor as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

13. Kirby v. Union Pac. R. Co., 94 Kan. 485, L. R. A. 1916E 528, 146 Pac. 1183. The Court said: "In the case at bar, the interstate carriage was not completed; merely the final destination of that interstate shipment was changed.

Can it be said that when goods are moving in interstate carriage, an alteration in transit of the final destination will change the interstate character of the shipment? If the railway company had granted a reduced, secret, or preferential rate for the remainder of the interstate carriage to the altered destination, would it have been free from federal prosecution? On the other hand, would the company be liable under Kansas law for the exaction of a rate different from the Kansas rate from Salina to Buffalo Park? Both questions must be answered in the negative."

while the car was yet in transit, paid it and became the possessor and owner of the bill of lading. The grain company then surrendered to the carrier the Yanka bill of lading and took in exchange another bill consigning the identical car to their own order at Elk Falls, Kas.

In denying that that part of the transportation from Topeka, Kan., to Elk Falls, Kan., was intrastate in character, the United States Supreme Court said:<sup>14</sup> "The motion to dismiss referred to at the outset is based on the ground that the action of the court involved no question of interstate but purely one of intrastate commerce. But this disregards the fact that the bill of lading which was sued upon was an interstate commerce bill covering a shipment from Kansas City, Missouri, to Elk Falls, Kansas. True it is urged that that bill of lading is not the test of whether there is jurisdiction because it was shown that in reality the shipment was an intrastate one from Topeka, Kansas, to Elk Falls in the State. But this assumes that although the judgment rests upon the conception that the previous movement of the corn from Yanka could not be considered as against the plaintiff because he was an innocent third holder of the bill of lading issued at Kansas City, nevertheless for the purpose of determining whether jurisdiction exists the facts as to the shipment from Yanka must be treated as relevant. Leaving aside, however, this contradiction and considering the facts as to the movement of the grain from its inception, we are of opinion that from that point of view it was clearly established that the grain moved in a continuous interstate commerce shipment from the date of its departure from Yanka to the termination of the transit at Elk Falls and that the delivery of the car to the Santa Fe at Topeka for further movement was therefore not a new and distinct shipment in intrastate commerce. We reach this conclusion in view of the place of business

14. *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665.



of the fact that there was no person at Topeka to whom of the Fisher Grain Company (Kansas City, Missouri), the grain was consigned, of the endorsement of the bill of lading to the Fisher Grain Company and the annexing to it of a draft drawn on that Company at Kansas City for the purchase price, and because the order on the face of the bill of lading to 'notify C. V. Fisher Grain Company, care of Santa Fe for shipment 'made it apparent that it was not contemplated that the interstate shipment should terminate at Topeka, but that the car should move on as the result of such direction as might be given while it was in transit by the Fisher Grain Company at Kansas City, Missouri.'"

**§ 119. Interstate Transportation Includes Receipt and Delivery of Traffic as well as Actual Carriage.** The beginning of the transit which constitutes interstate commerce is the point of time when an article is committed to a carrier for transportation to another state or started on its ultimate passage.<sup>15</sup> Interstate transportation, therefore, not only includes the carriage of goods from one state to another but also the receipt of the goods by the initial carrier and the final delivery to the consignee.

A carrier must, at all times, be in proper condition to receive from the shipper and to deliver to the consignee.<sup>16</sup> Hence, the facilities of a carrier for both the delivery and the receipt of freight as to interstate shipments are under federal control;<sup>17</sup> for the transportation commences with delivery to the carrier and does not

15. *Bay v. Merrill & Ring Logging Co.*, 243 U. S. 40, 61 L. Ed. 580, 37 Sup. Ct. 376; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 61 L. Ed. 578, 37 Sup. Ct. 374; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. Ed. 999.

16. *Covington Stock-Yards Co.*

*v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461.

17. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246.



end until delivery or an offer to deliver to the consignee.<sup>18</sup> But the carrying of products in wagons or other vehicles to a railroad depot from the surrounding country is no part of an interstate journey.<sup>19</sup> Nor is the carrying of logs from timber land to a tidewater point in the same state by a logging railroad over its own tracks a part of interstate transportation.<sup>20</sup>

**§ 120. When Temporary Stoppage or Interruption Changes Interstate Character of Shipment into Intrastate and vice versa.** The Act to Regulate Commerce provides that no break or bulk, stoppage or interruption made by any carrier shall prevent the carriage of freight from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption is made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any provisions of the statute.<sup>21</sup>

When, therefore, freight is delivered to a carrier and is actually started in the course of transportation from one state to another, its interstate character commences and continues to the point of destination<sup>22</sup> and so when freight is delivered to a carrier and started in the course of transportation from one point to another in the same state, its *intrastate* character then commences and continues to the point of destination, unless it is known or intended by the shipper, either when the delivery was made or while the movement is in progress, that the freight shall be carried to a point outside of the state.

18. *United States v. Union Stock Yard & Translt Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475.

19. *Coe v. Errol*, 116 U. S. 517.

29 L. Ed. 715, 6 Sup. Ct. 475.

20. *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36; 61 L. Ed. 578, 37 Sup. Ct. 374.

21. Section 7 of the Act to Regulate Commerce, Appendix A, *infra*.

22. Section 114, *supra*.

Whether a temporary stoppage or interruption of freight in transit "breaks" the continuity of an interstate shipment so that its character is changed into that of an intrastate shipment, or *vice versa*, depends upon the character of the movement and not the billing. This question has been frequently raised in determining whether interstate or intrastate rates apply, and also in taxation cases<sup>23</sup> wherein the states attempted to tax property which the owner claimed was under an interstate shipment. For example, a carload of corn was shipped from Hudson, S. Dak., under a bill of lading, to Texarkana, Tex. Five days later the corn was shipped from Texarkana to Goldthwaite, both points in the state of Texas, upon a new contract. The shipment between the last two points was held to be intrastate in character.<sup>24</sup> In another case, it appeared that several carloads of coal were transported from points in Illinois to Davenport, Ia., under bills of lading calling for delivery at Davenport, where the charges to that point were paid. The city of Davenport was a distributing

23. *Bacon v. People*, 227 U. S. 504, 57 L. Ed. 615, 33 Sup. Ct. 299; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. Ed. 754, 28 Sup. Ct. 475. In *People v. State of Illinois*, *supra*, the court said: "The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was

in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way without discrimination."

24. *Gulf, C. & S. F. R. Co. v. State*, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360.

point for the coal and the certainty in regard to the shipments ended at Davenport. The point where the coal was to be shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport. The cars were then shipped under a new contract over another railroad to other cities in the state of Iowa. The second shipments, the court held, constituted intrastate movements.<sup>25</sup>

Shipments of grain were made from initial points in Missouri to "hold" tracks in Kansas City, Mo., with no intention or knowledge on the part of the shipper or carrier that the grain would be moved beyond that destination point. Some of the cars of grain, after sale on the floor of the board of trade at Kansas City, were then transported from the "hold" tracks to other points in another state. The court held that the interstate transportation commenced at the hold tracks and not at the initial points of shipments in the interior of Missouri.<sup>26</sup> Where cars of coal were shipped and billed from McAllister, Okla., to Denison, Tex., the further disposition of such shipments to be determined after

25. *Chicago, M. & St. P. R. Co. v. State*, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592. Mr. Justice Hughes in this case said: "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract. *Ohio Railroad Commission v. Worthington*, 225 U. S. 101; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Railroad Commission of Louisiana v. Texas & P. Ry. Co.*, 229 U. S. 336. But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a

point within the same state from having an independent and intrastate character. *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, 109; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 129, 130. The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport."

26. *State ex rel. Chicago, M. & St. P. Ry. Co. v. Public Service Commission of Missouri*, 269 Mo. 63, 189 S. W. 377.



reaching Denison, a subsequent movement of the coal from Denison to Waco, Tex., was intrastate in character.<sup>27</sup> A shipper delivered logs to a carrier at a point in Mississippi for transportation to Batesville, in the same state. A further movement from Batesville was not intended by the shipper. After a sale the logs were delivered to another carrier at Batesville for shipment to Memphis, Tenn. The court held that the interstate shipment commenced at Batesville and not at the initial point of delivery.<sup>28</sup>

In a controversy as to whether interstate or intrastate rates should be charged to Chicago, Ill., on grain originating at points in Illinois, billed to Chicago, and there stored in, or transferred through, elevators and ultimately moved therefrom to destinations beyond the state, the Interstate Commerce Commission held that the movement to Chicago was governed by the state and not the interstate rate.<sup>29</sup> Bolts and billets, originating in Kentucky, were moved by water and rail to Paducah, Ky., where they were manufactured into club-turned spokes and later shipped to Moline, Ill. The first movement was under one contract and the subsequent transportation to Moline from Paducah was under a new contract. The Commission held that it had no jurisdiction over the rate for the carriage into Paducah.<sup>30</sup>

**§ 121. When Interstate or Intrastate Character of a Shipment is not Changed by Temporary Stoppage or Interruption.** But when a commodity is shipped from a point in one state to a point in another, its interstate character then commences, and the various mutations through which the article passes, and the

27. *Missouri, K. & T. Ry. Co. of Texas v. Pace*, — Tex. Civ. App. —, 184 S. W. 1051.

28. *Batesville Southwestern R. Co. v. Mims*, 111 Miss. 574, 71 So. 827.

29. *Illinois Grain to Chicago*,

40 I. C. C. 124. See also *Merchants Exch. of St. Louis v. Baltimore & O. R. Co.*, 34 I. C. C. 341.

30. *Mutual Wheel Co. v. Nashville, C. & St. L. R. Co.*, 40 I. C. C. 612.



handlings which it undergoes while in transit, are merely incidental to such an interstate movement.<sup>31</sup>

For example, where milk was shipped from several points in New York to Boston, Mass., the fact that it was inspected, pasteurized, refrigerated and transferred to other cars at Eagle Bridge, N. Y., to be further transported to Boston, did not render the shipment from the initial points to Eagle Bridge intrastate.<sup>32</sup> In another case it appeared that for several years tie contractors, residing and doing business in Indiana, bought and shipped ties from several points in Missouri to eastern destinations, usually by way of Cairo, Ill. After a reduction in the intrastate rates on ties in Missouri, the contractors bought a yard at Commerce, Mo., directly across the Mississippi river from Cairo, and, thereafter, shipped the ties from the initial points in Missouri to Commerce for inspection and assortment. The ties were unloaded at Commerce, inspected, culled, and then shipped from Commerce to Cairo on barges and thence to the eastern destination points. The Missouri Supreme Court held that the intrastate rate did not apply from the initial points to Commerce as the shippers knew and intended that the ties would eventually go out of the state. The interstate character of the shipments, it was held, commenced, from the initial points in Missouri and continued to the destination points on eastern railroads.<sup>33</sup>

Uncompressed cotton, purchased at Albertville, Ala., for export and for sale outside of the state of Alabama, was shipped to Birmingham, Ala., where the cotton was unloaded, compressed, and then rebilled and reshipped in

31. *Pine Belt Lumber Co. v. Gulf & S. I. R. Co.*, 33 I. C. C. 117; *Mixed Car Dealers' Ass'n v. Delaware, L. & W. R. Co.*, 33 I. C. C. 133; *Liberty Mills v. Louisville & N. R. Co.*, 23 I. C. C. 182; *In re Substitution of Tonnage*, 18 I. C. C. 280; *Merchants Cotton Press & Storage Co. v. Illinois Cent. R. Co.*, 17 I. C. C. 98; *In re Milling-in*

*Transit Rates*, 17 I. C. C. 113; *In re Alleged Unlawful Rates and Practices in Transportation of Cotton*, 8 I. C. C. 121; *Duluth-Superior Milling Co. v. Northern Pac. R. Co.*, 152 Wis. 528, 140 N. W. 1105.

32. *Hood & Sons v. Delaware & H. Co.*, 17 I. C. C. 15.

33. *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703.

other cars to New Orleans, La. The entire transportation from Albertville to New Orleans, it was held, constituted an interstate shipment, and the intrastate rate was not applicable between Albertville and Birmingham.<sup>34</sup> A passenger, having baggage to ship from St. Francis, Ark., to Delta, Mo., purchased a ticket to Bernie, Mo., an intermediate point, and checked his goods to that station. Upon arrival at Bernie, he bought another ticket to Delta and rechecked the baggage to Delta. The goods were destroyed in a car at Bernie, after being rechecked. The shipment throughout, from St. Francis to Delta, was interstate and the tariffs on file with the Interstate Commerce Commission applied to the goods while in transit even between the two Missouri points.<sup>35</sup>

Where commodities were shipped from a point in Louisiana to New Orleans, La., under a bill of lading calling for a delivery at New Orleans, but in fact intended by the shippers to be exported to foreign coun-

34. *Alabama Great Southern R. Co. v. George H. McFadden & Bros.*, 232 Fed. 1030, in which the court said: "I fail to see how the shipments from Albertville to Birmingham, under the circumstances of the present case, can be construed as interstate. The stoppage in transit for compression at Birmingham, the assembling of the cotton originating at Albertville with other cotton purchased at Birmingham and other points in Alabama, and the subsequent routing of the compressed cotton to points determined by the defendants according to their trade contracts, do not relieve the shipments originating at Albertville and billed to Birmingham, and subsequently billed from Albertville or Attalla to New Orleans, of their character as interstate commerce. There was no change of ownership from

the time the cotton left Albertville until its arrival at New Orleans. It was continuously in the possession, custody, and control of the carrier, and the stoppage of the cotton at Birmingham for compression, still in the possession of the carriers, was merely for a service incidental to its transit over the entire interstate route. That the essential character of the commerce, not its mere accidents, such as its billing, its handling and concentration at Birmingham, or the loss of identity of the actual cotton shipped from Albertville, determines its interstate character, is no longer open to dispute."

35. *Reynolds v. St. Louis Southwestern R. Co.*, 195 Mo. App. 215, 190 S. W. 423. Contra, but erroneous: *Kansas City Southern Ry. Co. v. Brooks*, 84 Ark. 233, 105 S. W. 93.

tries, the cars remaining on the tracks at New Orleans for several days without the usual demurrage charges and then unloaded from the cars and put on board ships for foreign countries, such shipments did not constitute intrastate movements between the two points in Louisiana so that the state rate might be applied thereto.<sup>36</sup>

An oil refining company shipping oil from a point in Kansas to a point in Oklahoma, in order to take advantage of the lower intrastate rate of Kansas, shipped the oil to another point in Kansas, close to the state line, where it employed an agent for the purpose of re-billing the oil to the Oklahoma destination point. The carrier refused to carry the oil from the initial point in Kansas to the delivering point in Oklahoma unless the interstate rate was paid for the entire movement. The Interstate Commerce Commission held that the oil refining company was attempting to evade the provisions of the Interstate Commerce Act and that the interstate rate applied.<sup>37</sup>

**§ 122. Sale and Delivery of Coal f.o.b. Cars at Mine for Transportation to Purchasers Outside the State.** When coal is sold and delivered f. o. b. at a mine for transportation to purchasers in other states, the commerce involved is interstate. The furnishing of cars, therefore, for this service, as needed and requested by the mine owner, is an essential step in the intended movement of the coal from one state to another. A movement thus initiated is interstate, and the facilities required are instrumentalities of interstate commerce.<sup>38</sup>

36. *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837.

37. *Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co.*, 34 I. C. C. 271.

38. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct.

896, in which Mr. Justice Hughes, for the Court, said: "In considering the right of the plaintiff to maintain this action, despite the proceeding before the Commission, an initial question is presented as to the nature of the commerce involved. It appeared, as stated by the state court, that practically all the coal mined by the plaintiff was



In overruling the decision of the Supreme Court of Pennsylvania,<sup>39</sup> holding that as the coal was sold at the mine to purchasers in other states, the commerce involved was not interstate, the United States Supreme

sold f. o. b. cars at the mines. About ninety-five or ninety-eight per cent was sold in this way. Hence, it is said, it is 'not subject to Interstate Commerce regulation.' We do not understand that it is questioned that a very large part of the damages recovered in this action pertain to coal which with a fair method of car distribution would have been shipped from the mines to purchasers in other States. There is no controversy as to the course of business. The plaintiff sold to persons within and without the State of Pennsylvania. The coal was loaded on cars to be transported to various points of destination not only in Pennsylvania but in other States. The transportation to other States absolutely depended upon a proper supply of cars, and it is manifest that unjust discrimination against the plaintiff in car distribution would improperly obstruct the freedom of such transportation, in which the plaintiff had a direct interest. And the question presented is whether unjust discrimination of this character is a subject which falls without the scope of the jurisdiction conferred upon the Interstate Commerce Commission, that is, whether there is an absence of such jurisdiction merely because the plaintiff sold its product, which was to be transported to other States. f. o. b. at its mines. This question must be answered in the negative. In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere bill-

ing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and the provisions of the Act to Regulate Commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply. \* \* \* Thus, in varying circumstances, the same principle has been applied in these cases and in the others cited; and that principle is that the jurisdiction of the Commission is determined by the essential character of the commerce in question. In the present case, to repeat, it appears that for the purpose of filling contracts with purchasers in other States, coal is delivered f. o. b. at the mines for transportation to such purchasers. The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce. A very large part of what in fact is the interstate commerce of the country is conducted upon this basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect either the power of Congress or the jurisdiction of the Commission which Congress has established."

39. *Sonman Shaft Coal Co. v. Pennsylvania R. Co.*, 241 Pa. 487, 88 Atl. 746.



Court said:<sup>40</sup> “The coal company sold its coal f. o. b. cars at the mine, and when the cars were loaded, the coal was promptly forwarded to the purchasers at points within and without the state,—largely to points in other states. This was well understood by both companies,—by the coal company when it asked for cars and by the railroad company when it supplied them. Cars were not requested or furnished merely to be used in holding or storing coal, but always to be employed in its immediate transportation. While furnishing some cars for this service, the railroad company failed to furnish as many as the coal company needed and requested. It is plain that supplying the requisite cars was an essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged.”

**§ 123. Shipments from Points in One State to a Port of Transshipment in Same State for Export Included.** The Interstate Commerce Commission has control over transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry in the United States or an adjacent foreign country.

The purpose of the statute was to give the Commission authority solely over the inland portion of a shipment to a foreign country, that is, as to outgoing shipments from the place of origin to the port of transshipment, and as to incoming shipments, from the port of entry to the point of destination in the United States. This control applies even when the point of origin and the port of transshipment or the port of entry and the point of destination are in the same state.

40. *Pennsylvania R. Co. v. Son-* man Shaft Coal Co., 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. 46.

When, therefore, an article of commerce is carried from any point in a state to a port of transshipment in the same state, but intended by the shipper to be exported to foreign countries, or where any article of commerce shipped from a foreign country is transported from a port of entry to the point of destination in the same state in a continuous carriage, such shipments constitute foreign commerce, and are subject to the Interstate Commerce Act, the inland part of the movement being under the jurisdiction of the Interstate Commerce Commission and not the laws of the state.<sup>41</sup> For example, a shipment from a point in Louisiana to New Orleans, La., a port of transshipment, of lumber destined to a foreign country, is not subject to the rates fixed by the state between the two points in Louisiana, but is under the control of the Interstate Commerce Commission.<sup>42</sup>

**§ 124. Shipments from One Foreign Country to Another Through the United States Beyond Control of Commission.** The Act to Regulate Commerce applies to carriers engaged in transportation from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other places in the United States, and to the transportation of property shipped from any place in the United States to a foreign country and to be carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of

41. *Texas & P. R. Co., v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Arkansas Pass Channel & Dock Co. v. Galveston, H. & S. A. Ry. Co.*, 27 I. C. C. 403; *In re Wharfage Charges at Galveston*, 26 I. C. C. 695; *Commerce of New York v. New York, C. & H. R. Co.*, 24 I. C. C. 55; *In re Advance on Cotton*, 23 I. C. C. 404; *In re Rates*

*of Louisiana Ry. & Nav. Co.*, 22 I. C. C. 558; *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C. 266; *In re Investigation of Grand Trunk Ry. Co.*, 2 I. C. R. 496.

42. *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837.

entry either in the United States or in an adjacent foreign country.

The transportation of goods from a foreign country through the United States to destination points in an adjacent foreign country is not, therefore, under the jurisdiction of the Commission.<sup>43</sup> Thus, the Commission had no power to order a reparation for overcharges in the shipment of sugar from Germany to Mexico and covering that part of the movement between New Orleans, La., and El Paso, Tex.<sup>44</sup> Neither has the Commission the power to prescribe the rate for the transportation of a commodity in bond from a point in Mexico through the United States to another point in Mexico.<sup>45</sup>

**§125. Regulation of Terminal Charges, Services and Facilities for Interstate Shipments.** Interstate transportation covers all stages of a shipment from the time of delivery of the freight to the carrier until the shipment is finally delivered to the consignee at the point of destination.<sup>46</sup> This principle was recognized by Congress in the passage of the Interstate Commerce Act when transportation was defined and declared to include all services in connection with the receipt, delivery and storage of interstate shipments. The regulation, therefore, of terminal charges, services and facilities for interstate shipments is clearly within the scope

43. *United States v. Philadelphia & R. Ry. Co.*, 188 Fed. 484.

44. *Morgan's L. & T. R. & S. S. Co.*, 35 I. C. C. 492.

45. *Canales v. Georgia, H. & S. A. Ry. Co.*, 37 I. C. C. 573.

46. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Southern R. Co. v. Burlington Lumber Co.*, 225 U. S. 99, 56 L. Ed.

1001, 32 Sup. Ct. 657; *Southern Ry. Co. v. Reid & Beam*, 222 U. S. 444, 56 L. Ed. 263, 32 Sup. Ct. 145; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475.

of the Interstate Commerce Act and the jurisdiction of the Interstate Commerce Commission.<sup>47</sup>

The states still have the power to make rules and regulations as to terminal service in connection with and relating to intrastate transportation;<sup>48</sup> but they have no power over cars moving in interstate commerce. "As legislation concerning the delivery of cars," said the Supreme Court,<sup>49</sup> "for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders

47. *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696; *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370.

48. *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Interstate Commerce Commission v. Illinois Cent. R. Co.* 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; *Central Stock*

*Yards Co. v. Louisville & N. R. Co.*, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. 339; *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802.

49. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203.



the State impotent to deal with a subject over which it had no inherent but only permissive power.”

**§ 126. Transportation Wholly Within One State Not Under Federal Control.** Under the commerce clause of the Constitution, Congress has no power to regulate intrastate commerce, that is, transportation of passengers, property or intelligence wholly within a single state.

In conformity, therefore, with the limitation upon the power of Congress, Section 1 of the Interstate Commerce Act provides that none of its provisions shall apply to the transportation of passengers or property, or the receiving, delivering, storing, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory, nor to the transmission of messages by telephone, telegraph or cable wholly within one state and not transmitted to or from a foreign country from or to any state or territory.

Transportation wholly within one state is not, therefore, subject to the control of the Commission.<sup>50</sup>

**§ 127. Transit Privileges Part of Transportation Under Control of Interstate Commerce Commission.** Prior to the amendment of 1906 the Interstate Commerce Commission had no jurisdiction to regulate the various forms of transit privileges granted to shippers by carriers, such as milling of grain, the dressing of lumber, of cotton, etc., except perhaps when the carriers practiced undue discrimination.<sup>51</sup>

50. *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Interstate Commerce Com-*

*mission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; *Hocking Valley R. Co. v. New York Coal Co.*, 132 C. C. A. 387, 217 Fed. 727; *Southern Pac. Co. v. Campbell*, 189 Fed. 696.

51. *Koch & Co. v. Pennsylvania R. Co.*, 10 I. C. C. 675; *Diamond Mills v. Boston & M. R. Co.*, 9 I. C. C. 311; *In re Wool, Hide & Pelt Rates*, 23 I. C. C. 151.

But the definition of the term "transportation" was amended so as to include all services in connection with the handling of property transported in 1906, and the Commission, since that time has held that transit privileges were regulations affecting the rate under its jurisdiction, and carriers may be compelled to accord shippers the privilege upon the payment of reasonable compensation.<sup>52</sup>

**§ 128. Regulation of Grain Elevation Service Under Federal Control.** By the Amendment of 1906 the transportation subject to federal control and the jurisdiction of the Interstate Commerce Commission, was extended so as to include the subject matter of grain elevator service. The statute makes it the duty of the carrier to provide and furnish all the facilities that are a part of the transportation included within the Act, and it is required to state in its schedules the charges for all privileges or facilities granted or allowed.

If an owner of property transported renders any service connected with such transportation, he may be allowed a reasonable and just compensation therefor. It has therefore been held that a railroad company may and must pay the owners of elevators a reasonable sum for elevating grain.<sup>53</sup> "The long mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the Interstate Commerce Commission," said the Court in the case cited, "was answered by the act of June 29, 1906, 34 Stat. L. 584, 590, c. 3591, in which Congress declared that 'the term 'transportation' shall include \* \* \* all \* \* \* facilities of shipment, \* \* \* irrespec-

52. *Lewis, Leonhardt & Co. v. Southern R. Co.*, 133 C. C. A. 237, 217 Fed. 321; *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577; *Wichita Board of Trade v. Abilene & S. Ry. Co.*, 29 I. C. C. 376; *In re Advances Fabrication-in-transit Charges*, 29

I. C. C. 70; *Spiegle v. Southern Ry. Co.*, 25 I. C. C. 71; *Transit Case*, 24 I. C. C. 340; *In re Wool, Hide & Pelt Rates*, 23 I. C. C. 151.

53. *Union Pacific R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39.

tive of ownership, \* \* \* and all services in connection with the \* \* \* elevation, and transfer in transit \* \* \* and handling of property transported.' Carriers were required 'to provide and furnish such transportation upon reasonable request therefor.' The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For Sec. 4 (34 Stat. 590) provides that 'if the owner \* \* \* renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable,' the Commission being authorized to determine what was reasonable. This act was passed after the decision by the Commission in 1904 (10 I. C. C. 309), that the Peavey contract was valid, and after the recommendation in its report for 1905 (p. 11), that it should be given authority to determine whether the allowance paid to the owner was just. The statute must be taken as a legislative recognition of the long-continued practice and a declaration that the incidental advantage derived by the owner was not undue. In pursuance of the authority thus expressly conferred the Interstate Commerce Commission, in April, 1907 (12 I. C. C. 86), fixed the allowance for elevating grain at  $\frac{3}{4}$  of a cent per hundred pounds, being actual cost, with no allowance whatever for profit. Its final order (14 I. C. C. 315), prohibiting any payment to the owner who performed this transportation service was reversed, as being beyond the jurisdiction of the Commission, because Congress had expressly permitted such payment to be made (*Interstate Commerce Commission v. Dittenbaugh*, Same v. Peavey, *ante*. p. 42). The language of the statute and this decision answer the Union Pacific's contention that it was unlawful to pay these companies for transportation services."

§ 129. Loading, Dunnage and Special Preparation of Freight Cars for Shipments of Particular Commodities. While the term "transportation," as defined in



the Act, the subject matters under which the carrier may be compelled to furnish, includes all services in connection with the receipt, delivery, elevation, ventilation, refrigeration or icing, and handling of the property transported, there are many elements in the special preparation of freight cars for the shipment of particular commodities which are not included within the scope of the transportation facilities which the carriers must furnish, and which must be supplied by the shippers themselves without any allowances therefor.<sup>54</sup>

54. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291, in which the Court said: "Sometimes the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. Cf. *National Lumber Dealers Association v. Atlantic Coast Line*, 14 I. C. C. 154; *Schultz v. Southern Pacific*, 18 I. C. C. 234; *In re Allowance for Lining and Heating Cars*, 26 I. C. C. 681; 25 I. C. C. 497. These inconsistent and conflicting demands serve to emphasize the fact that, before the haul actually begins, the right or duty of each party, where not absolutely fixed by statute, must be decided with reference to the special facts of each case. As a general rule, the carrier loads all freight tendered in less than carload lots while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. This practice has grown up not only because the work can

be more satisfactorily performed by the owner, but also because it is impossible for railroad companies economically to load cars at private warehouses or on those tracks where vehicles of the consignor or consignee come and go at the direction of the owner. 25 I. C. C. 490. But loading may involve more than the mere placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks and binders needed to make the transportation safe; or, the freight may be such as to require a special covering, packing, icing or heating, in order to preserve the merchandise in condition fit for use at the end of the journey. Who is to furnish these needed facilities, may be quite as uncertain as who is to place the freight on the car, and can only be determined by considering the character of the shipment, the place where the loading begins, and who can most economically perform the service required. Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and



No hard and fast rule has been established as to who shall supply these accessorial services necessary to prepare freight cars for shipment, but the respective duties and rights of the shippers and carriers in connection thereto can only be determined by considering the character of the shipment, the place where the loading begins and who can most economically perform the service. The interests of the public as well as the carrier are to be considered, and the rights and duties of each party when not controlled by statute, must be decided largely with reference to the special facts of each case. Generally, however, where special preparation is required to fit a car for the shipment of a particular commodity, the duty devolves upon the shipper.<sup>55</sup> For example, the duty to provide stakes to be used in shipping lumber on flat cars where it appeared that it was impracticable to provide a permanent stake which would be a part of the car itself, it was held, should not be placed upon the carrier.<sup>56</sup>

Carriers should not be compelled, it was held in another case, to furnish the lining on the walls of the car and the padding on the floor necessary to properly transport flour in cotton sacks so that the sacks might not be torn through friction with the sides and floor of the car.<sup>57</sup> The furnishing of such a protection partakes of the nature of a private packing rather than of a public equipment. On the other hand, where perishable freight moves regularly and in sufficient volume to justify it, the carrier is required to furnish special equipment for protecting certain kinds of traffic from freezing.<sup>58</sup> The

carriers—their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the loading is done in whole or in part by the carrier.”

55. *New York State Shippers Protective Ass'n v. New York Cent. & H. River R. Co.*, 30 I. C. C. 437; *Southwestern Missouri Millers' Club v. St. Louis & S. F. R.*

*Co.*, 26 I. C. C. 245; *Davies v. Louisville & N. R. Co.*, 18 I. C. C. 540.

56. *National Wholesale Lumber Dealers' Ass'n v. Atlantic C. L. R. Co.*, 14 I. C. C. 154.

57. *Southwestern Missouri Millers' Club v. St. Louis & S. F. R. Co.*, 26 I. C. C. 245.

58. *In re Advances Protection of Potato Shipments in Winter*, 29 I.

service of loading, furnishing material and placing in cars is an additional service over and above the transportation for which the carrier is entitled to receive compensation, and hence a tariff providing that the carrier would load fruits and vegetables, supply and place the dunnage and braces at the expense of the shipper was approved by the Commission.<sup>59</sup>

**§ 130. Weighing of Interstate Shipments of Freight Under Federal Control.** As the amendment of 1906 included all service in connection with the receipt, delivery and handling of property transported in interstate and foreign commerce, the charges for weighing freight are under federal control. The weighing service is an incident to the transportation service as it is used in the computation of freight charges. The Interstate Commerce has, therefore, jurisdiction to determine the reasonableness and nondiscriminatory character of weighing service.<sup>60</sup>

**§ 131. Regulations and Rules Concerning Baggage of Interstate Passengers Under Control of Commission.** Under the common law, the decisions of the courts as to what was baggage, and what was the extent of the carriers' liability were not uniform.<sup>61</sup> The rights of

C. C. 504; Protection of Potatoes in Winter, 26 I. C. C. 681.

59. In re Advances Dunnage Allowances, 30 I. C. C. 539; See also *Davies v. Louisville & N. R. Co.*, 18 I. C. C. 540.

60. *Detroit Coal Exchange v. Michigan C. R. Co.*, 38 I. C. C. 79. See also *New England Coal & Coke Co. v. Norfolk & W. Ry.*, 22 I. C. C. 398; *Wilson Produce Co. v. Pennsylvania R. R.*, 14 I. C. C. 170.

61. *United States. Saunders v. Southern R. Co.*, 62 C. C. A. 523, 128 Fed. 15.

**Arkansas.** *Kansas City, P. & G. R. Co. v. State*, 65 Ark. 363, 41 L. R. A. 333, 67 Am. St. Rep.

923, 46 S. W. 421; *Kansas City, Ft. S. & M. Ry. Co. v. McGahey*, 63 Ark. 344, 36 L. R. A. 781, 58 Am. St. Rep. 111, 38 S. W. 659.

**Kentucky.** *Illinois Cent. R. Co. v. Matthews*, 24 Ky. L. Rep. 1766, 60 L. R. A. 846, 72 S. W. 302.

**Maine.** *Wood v. Maine Cent. R. Co.*, 98 Me. 98, 99 Am. St. Rep. 339, 56 Atl. 457.

**Minnesota.** *McKibbin v. Great Northern Ry. Co.*, 78 Minn., 232, 80 N. W. 1052.

**Mississippi.** *Yazoo & M. V. R. Co., v. Georgia Home Ins. Co.*, 35 Miss. 7, 67 L. R. A. 646, 107 Am. St. Rep. 265, 37 So. 500.

**Nebraska.** *Ringwalt v. Wabash*

passengers were subject to conflicting statutes and decisions of various courts.

To secure uniformity and reasonableness of all regulations governing baggage as to all interstate passengers, the Interstate Commerce Act was amended in 1910 so that thereafter it became the duty of all common carriers to establish, observe and enforce just and reasonable regulations and practices affecting the carrying of personal, sample and excess baggage.<sup>62</sup>

Prior to the 1910 amendment, the Act contained no specific provision relating to the interstate transportation of baggage. Conformable to the requirements of the 1910 amendment, the carriers appointed a committee to collate their baggage rules and regulations, and new regulations governing the transportation of baggage were adopted and enforced.<sup>63</sup>

**§ 132. Refrigeration, Ventilation and Icing of Property in Cars Part of Transportation Duties of Interstate Carriers.** Under the Hepburn Amendment of 1906, refrigeration, ventilation and icing of property transported in interstate and foreign commerce became a part of the transportation service which the carriers under federal control are required to furnish upon reasonable request therefor.<sup>64</sup> Carriers, therefore, may

R. Co. 45 Neb. 760, 64 N. W. 219.

**New Jersey.** Runyan v. Central R. Co. of New Jersey, 61 N. J. L. 537, 43 L. R. A. 284, 68 Am. St. Rep. 711, 41 Atl. 367; Pennsylvania R. Co. v. Knight, 58 N. J. 287, 33 Atl. 845.

**New York.** Knieriem v. New York Cent. & H. River R. Co., 109 N. Y. App. Div. 709, 96 N. Y. Supp. 602; Curtis v. Delaware L. & W. R. Co., 74 N. Y. 116, 30 Am. St. Rep. 271.

**South Carolina.** Adger v. Blue Ridge Ry. Co., 71 S. C. 213, 110 Am. St. Rep. 568, 50 S. E. 783.

**Tennessee.** Yazoo & M. V. R. Co. v. Baldwin, 113 Tenn. 205, 81 S. W.

599; Nashville C. & St. L. R. Co. v. Lillie, 112 Tenn., 331, 105 Am. St. Rep. 947, 78 S. W. 1055.

**Texas.** Missouri, K. & T. R. Co. of Texas v. Meek, 33 Tex. Civ. App. 47, 75 S. W. 317.

62. Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450; In re Advances Regulations Restricting the Shape of Baggage, 33 I. C. C. 266; In re Baggage Regulations, 26 I. C. C. 292.

63. Jewelers Protective Union v. Pennsylvania R. Co., 36 I. C. C. 71.

64. Cudahy Packing Co. v. Grand Trunk Western R. Co., 131 C. C. A.



use their own refrigeration cars and ice them, and cannot be compelled to accept those tendered by the shipper; for whatever transportation service or facility the law requires carriers to supply, they have the right to furnish them.<sup>65</sup>

Even under the common law a railroad company, holding itself out as a carrier of perishable goods, was under legal obligation, arising out of the nature of its employment, to provide suitable and necessary lines and facilities for such transportation.<sup>66</sup> When the refrigera-

401, 215 Fed. 93; *In re Precooling and Preicing*, 23 I. C. C. 267.

65. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291, in which Mr. Justice Lamar said: "This rule is attacked by the appellants, who contend that icing is a part of refrigeration, which the Hepburn Act makes a part of the transportation they are bound to furnish upon reasonable request. They insist that in order to meet the duty, thus imposed by statute, they have been compelled at great expense to erect immense plants where trainloads of fruit can be cooled and where an enormous quantity of ice is manufactured for refrigeration purposes. They argue that, being bound to furnish all necessary icing and reicing and having at great cost prepared to furnish the supply, it is not only just, but a right given by statute, that they should be allowed to provide all needed icing or refrigeration at a rate to be approved by the Commission. Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on condition

that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers cannot be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another. This contention was sustained by the Commission, which recognized that 'the shipper has no right to provide refrigeration himself today and call upon the railroad company for that service tomorrow. To permit such a course is to demoralize the service of the defendants and prevent them from discharging their duty with economy and efficiency . . . It is the duty of the carrier to furnish refrigeration upon reasonable demand, and in so far as the furnishing of that refrigeration is a part of the service rendered by the carrier, the carrier may insist upon its right to furnish that service exclusively.' 20 I. C. C. 116.

66. *United States. Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 92 C. C. A. 114, 166 Fed. 206.



tion service is wholly under the control of the carrier and it determines when ice shall be supplied and in what quantities so that the shipper neither directs the use nor knows the amount used, and the amount depends upon the manner in which the car is handled by the carrier itself, the charge should be a gross sum for the entire service, and a tariff requiring the shipper to pay for the amount of ice consumed in reicing, is unduly discriminatory between different shippers.<sup>67</sup>

When ice is actually needed and used in the transportation of perishable goods, the question has frequently arisen even since the passage of the Hepburn amendment, whether the icing is a part of the transportation or is a part of the preparation for transportation which may be done by the shipper himself. In other words, has the shipper the legal right under some circumstances to precool and preice his own shipment? This question was decided by the Supreme Court in *Atchison, T. & S. F. R. Co. v. United States*,<sup>68</sup> known as the Precooling Case. The Commission had made two orders, one reducing the rate on precooled and preiced freight from points in Southern California to eastern destinations, and the other requiring the carriers to maintain tariffs permitting preicing and precooling of their own shipments by shippers, this being a service performed by the shippers in precooling the freight, and placing in the bunkers of the cars the icing necessary for the preservation of the freight during transportation. In sustaining the validity of the orders of the Interstate Commerce Commission, the Supreme Court held on the question

**Colorado.** *Carr v. Schafer*, 15 Colo. 48, 24 Pac. 873.

**Iowa.** *Beard v. Illinois Cent. Ry. Co.*, 79 Iowa 518, 7 L. R. A. 280, 18 Ann. St. Rep. 381, 44 N. W. 800.

**Michigan.** *Johnson v. Toledo, S. & M. R. Co.*, 133 Mich. 596, 103 Am. St. Rep. 464, 95 N. W. 724.

**Pennsylvania.** *Davenport Co. v. Pennsylvania R. Co.*, 173 Pa. St. 398, 34 Atl. 59.

**Virginia.** *New York, P. & N. R. Co. v. Cromwell*, 98 Va. 227, 49 L. R. A. 462, 81 Am. St. Rep. 722, 35 S. E. 444.

67. *Crutchfield & Woolfolk v. Southern P. Co.*, 24 I. C. C. 651.

68. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291.

of confiscation, that a rate fixed by the Commission which apparently excluded any compensation for hauling ice for refrigeration, is not confiscatory when it appears that the rate for the freight itself practically excludes the rate for the ice. On the preicing feature, the court held that a tariff withdrawing the privilege of preicing, fixed a rule and practice within the meaning of Section 15 of the Act empowering the Commission to determine whether any new practice is unreasonable; that it depends upon the facts and circumstances of each case whether icing is a part of the preparation for a shipment to be done by the shipper or is a part of the transportation to be furnished by the carrier; that neither the shipper nor carrier can insist upon a wasteful or expensive service for which the consumer must ultimately pay; and that under the circumstances of the case, the shippers have the right to price their shipments.<sup>69</sup>

**§ 133. Track Storage and Demurrage Charges in Connection with Interstate Shipments Under Control of Commission.** A shipment is not completed until arrival at destination and delivery to the consignee or an attempt to deliver to the consignee. The power of Congress under the commerce clause covers everything relating to the delivery of freight transported between the states.<sup>70</sup> Pursuant to this authority, Congress legislated concerning the subject matter of demurrage and track storage charges on interstate freight by including all services in connection with the delivery and storage of property transported from one state to

69. Where refrigeration service is rendered and charges are assigned therefor, the tariffs should provide and state the amount. *Sulzberger v. Minneapolis, St. P. & S. S. M. R. Co.*, 40 I. C. C. 173.

70. *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *Rhodes v. State*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664; *Interstate Commerce Commission v. Detroit, G. H. & M. Ry.*

*Co* 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Bowman v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 31 Ed. 700, 8 Sup. Ct., 689, 1062. In *Rhodes v. State of Iowa*, the Court said: "We think that interpreting the statute by the law of all its provisions it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment, whilst the merchandise was in

another under the definition of transportation in the statute. The assessment of demurrage and track storage charges on such shipments is, therefore, within the exclusive jurisdiction of the Interstate Commerce Commission.<sup>71</sup>

**§ 134. Wharves and Connecting Tracks of Interstate Carriers Public Facilities Under Federal Control.**

The provisions of the Interstate Commerce Act as amended in 1906 are broad enough to include all facilities of any description, used in the transportation, or in connection with the transportation of property in commerce subject to the statute.<sup>72</sup>

Under the common law wharves and tracks leading thereto of common carriers were private facilities, the use of which the carrier might refuse to all persons, or might grant to some and deny to others;<sup>73</sup> but since the enactment of the Hepburn amendment, such wharves are public facilities subject to the provisions of the Interstate Commerce Act.<sup>74</sup> The regulations and prac-

transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

71. *Michie v. New York, N. H. & H. R. Co.*, 151 Fed. 694; *United States v. Standard Oil Co.*, 148 Fed. 719; *Wholesale Produce Dealers Ass'n of Brooklyn, New York v. Long Island R. Co.*, 26 I. C. C. 413; *In re Demurrage Charges*, 25 I. C. C. 314; *Murphy Bros. v. New York Cent. & H. River R. Co.*, 21 I. C. C. 176; *Turnbull Co. v. Erie R. Co.*, 17 I. C. C. 123; *Wilson Produce Co. v. Pennsylvania R. Co.*, 16 I. C. C. 116; *New York Hay Exch. Ass'n v. Pennsylvania R. Co.*, 14 I. C. C. 178; *Wilson Produce Co. v. Pennsylvania R. Co.*, 14 I. C. C. 170; *Kehoe & Co. v. Charleston & W. C. Ry. Co.*, 11 I. C. C. 166.

72. *United States v. Union Stock Yard & Transit Co. of Chicago*, 226

U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83.

73. *Louisville & N. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. 745.

74. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279. In that case Mr. Justice McKenna, for the Court, said: "There is great difference between competing carriers claiming the right to use the facilities of one another and the patrons of the same carrier contending for equality of treatment. In stating this we assume that the wharves in the pending case are the instruments of a common carrier. This is, however, denied, and it is asserted that the Terminal Company is purely a wharfage company, and 'has no power under its charter to



tices affecting the use of wharves owned by rail car-

act as a common carrier.' The contention is based on a partial view of the conditions. The Terminal Company was incorporated to execute the purposes expressed in the act of the legislature of the State of Texas, that is, to construct terminal facilities for the Southern Pacific Railroad and Steamship systems, and to accommodate the export and import traffic at Galveston; and necessarily, as instrumentalities of such traffic, wharves and piers are as essential as steamships and railroad, and are, in fact, as they were intended to be by the charter of their authorization, parts of a system. The only track facilities for movement of cars to or from the ships, from or to the tracks of the Southern Pacific Railways, are on the Terminal Company's lands, and are owned by it. To these tracks the Galveston, Harrisburg and San Antonio Railway switches cars for other railroads, charging \$1.75 per car, and the Terminal Company receives a trackage charge of 50 cents per car. It is true that the Terminal Company does a wharfage business and publishes a schedule of its charges, while not filed with the Interstate Commerce Commission, shows a charge of 20 cents a ton on cotton seed cake and meal, and this appears as a wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and other railways entering the city of Galveston. And, besides, the Terminal Company was a party to numerous circulars issued by the Southern Pacific Railway Company, and that effective May 23, 1905, was filed with the Interstate

Commerce Commission. These circulars gave terminal charges at the port of Galveston. The charge on cotton seed meal and cake was given at 1 cent per 100 pounds. Shipments on through bills of lading include in the freight rate the wharfage charge. Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies. As said by the Interstate Commerce Commission, 'the Terminal Company was organized to furnish terminal facilities for the system at the port of Galveston,' and it is further said that 'through shipments on the railroad lines from and to points in different States of the Union pass and repass over the docks of the Terminal Company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single



riers engaged in interstate commerce and used for receiving and delivering property moved by rail in interstate and foreign commerce must be reasonable and nondiscriminatory.<sup>75</sup>

**§ 135. Jurisdiction of Commission Over Port Switching Service Performed on Import Traffic.** The

corporation.' And this unity of the railroad's lines and the terminal facilities is recognized in the lease to Young. By it he agrees to route all of his shipments over 'the lines of the Terminal Company and its connections, according to the instructions of said Terminal Company from time to time.' And provision is made against the possibility of other lines bidding for the traffic by lower rates. In such event he must give notice to the Terminal Company and give it 'the option of meeting such proposed rates,' and if the company 'elects to do so,' then he 'shall not divert such shipments, but shall abide by the provisions' of his agreement. And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, 'a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. . . . The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate, the Commission has jurisdiction to supervise and control it within statutory

limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority.' The reasoning of the Commission is justified by the statute. It includes in the term 'railroad' 'all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.' The property of the Terminal Company is 'necessary in the transportation or delivery' of the interstate and foreign freight transported by the lines of the Southern Pacific System."

75. *Railroad Com'rs of Florida v. Atlantic C. L. R. Co.*, 28 I. C. C. 356; *In re Wharfage Facilities at Pensacola, Florida* 27 I. C. C. 252; *Humboldt Steamship Co. v. White Pass & Yukon Route*, 25 I. C. C. 136; *Flour City Steamship Co. v. Lehigh Valley R. R.*, 24 I. C. C. 179; *Mobile Chamber of Commerce v. Mobile & O. R. R.*, 23 I. C. C. 417.

Act to Regulate Commerce applies to the transportation of property shipped from a foreign country to any place in the United States and carried to such places from port of entry.<sup>76</sup> A switching service, therefore, by a rail carrier of foreign freight in a car from a vessel to team tracks in the same city, is subject to the Interstate Commerce Act.<sup>77</sup> In the case cited, it appeared that the railroad company had filed with the Commission a switching tariff providing for a charge of \$2.00 per car for switching carload shipments within the limits of the city of New Orleans. Vessels carrying bananas from Central America were docked at New Orleans and a part of the bananas was loaded directly from the vessels into cars which were then switched to team tracks within the city where the bananas were unloaded. The railroad company refused to collect its published tariff charge on the theory that the movement of a car from the dock to a team track was not subject to the Interstate Commerce Act, but the Commission held that the service was a movement of foreign commerce and fell within the jurisdiction conferred upon the Commission in Section 1 of the Act.

**§ 136. Interstate Transportation by Land of Explosives and Other Dangerous Articles Under Federal Control.** Under an act of Congress approved March 4, 1909, known as the Transportation of Explosives Act, the Interstate Commerce Commission is directed and empowered to formulate and prescribe rules and regulations governing the safe transportation of explosives, which rules, the statute declares, shall be binding upon all common carriers engaged in the interstate or foreign transportation of explosives by land.

The Commission is further empowered, of its own motion, or upon the application of an interested party, to make changes or modifications in such regulations, made desirable by new information or altered conditions.

76. Section 1, Act to Regulate Commerce, appendix A, *infra*.

77. *United States v. Illinois Cent. R. Co.*, 230 Fed. 940.

Such regulations are required to be in accord with the best known practicable means for securing safety in transit, covering the packing, marking, loading, handling and precautions necessary to determine whether the material is in proper condition to transport. It is further provided in this statute that such regulations as well as all changes and modifications thereof, shall take effect ninety days after their formulation and publication by the Commission, and shall be in effect until reversed, set aside or modified.<sup>77a</sup>

The Interstate Commerce Commission in 1910 instituted an investigation into the reasonableness of the rules of the American Railway Association governing the transportation of explosives and other dangerous articles on the lines of the carriers who were members of that association. Thereafter the Commission prescribed rules and regulations in conformity with the provisions of the Transportation of Explosives Act, which became effective on March 31, 1912.

In *National Petroleum Association v. Atchison, T. & S. F. Ry. Co.*,<sup>78</sup> the complainant alleged that certain requirements of these rules were unreasonable and unnecessary; but the Commission held that the particular rule attacked was in the nature of a federal police regulation designed to minimize as much as possible the dangers attending the transportation of inflammable liquids, and to promote the safety of life and property by requiring efficient equipment.

**§ 137. Peddling Merchandise from Cars not Transportation Service Which Carriers may be Compelled to Furnish.** The use of cars, tracks and yards of a carrier in retailing commodities, generally known as "peddling service" is not a part of transportation within the Act to Regulate Commerce that a shipper may demand of a carrier.

<sup>77a</sup>. For copy of act, see Appendix P, *infra*.

<sup>78</sup>. *National Petroleum Ass'n v. Atchison T. & S. F. Ry. Co.*, 38 I. C. C. 65.

The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.<sup>79</sup> The mere toleration by a carrier through a period of years of the use of its cars for the purpose of vending perishable commodities affords no basis for a rule by the Commission that the practice has grown into a shipper's right and a carrier's duty under the law.<sup>80</sup>

**§ 138. Terms "Railroad" and "Transportation" Defined by Statute.** Section 1 of the Interstate Commerce Act defines the term "railroad" as used in the Act, to include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad whether owned or operated under a contract, agreement or lease, and shall include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the person or property designated in the statute, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of the said property. The term "transportation" as defined in the statute includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported.<sup>81</sup>

**§ 139. Statute not Applicable to all Interstate Commerce.** The Interstate Commerce Act in its application to interstate commerce, is limited to common carriers by rail, express companies, sleeping car companies, tele-

79. *Great Northern R. Co. v. State ex rel. State Railroad & Warehouse Commission*, 238 U. S. 340, 59 L. Ed. 1337, 35 Sup. Ct. 753; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. Ed. 192, 26 Sup. Ct. 91.

80. *The Car Peddling Case*, 45 I. C. C. 494.

81. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup.



graph, cable and telephone companies, carriers of oil or other commodities, except water and gas, by pipe line or partly by pipe line and partly by railroad or water, and carriers by water used under a common arrangement with carriers by rail.

The provisions of the statute do not apply to carriers engaged in traffic wholly by water.<sup>82</sup> Nor has the Commission any jurisdiction over stage coach companies engaged in interstate commerce.<sup>83</sup> A baggage company conveying passengers and baggage by bus and transfer wagons between railroad stations in a city and stations and residences, was held to be a common carrier engaged in interstate commerce, but not subject to the provisions of the Interstate Commerce Act as it was not a common carrier within any of the classes mentioned in the statute.<sup>84</sup> Transportation by team and wagon from one state to another is not subject to the statute.<sup>85</sup>

Ct. 177; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 59 L. Ed. 1036, 35 Sup. Ct. 645; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Hoadley Brake Shoe Co. v. American Brake Shoe & Foundry Co.*, 141 C. C. A. 638, 227 Fed. 90.

82. *In re Jurisdiction over Water Carriers*, 15 I. C. C. 205; *Ull-*

*man v. Adams Exp. Co.*, 14 I. C. C. 340; *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C. 266.

83. *Wylie v. Northern P. R. Co.*, 11 I. C. R. 145.

84. *Re Exchange of Free Transportation*, 12 I. C. C. 39.

85. *Cary v. Eureka Springs R. Co.*, 7 I. C. R. 286.

## CHAPTER VIII

### UNJUST DISCRIMINATIONS AND UNLAWFUL PREFERENCES BY INTERSTATE CARRIERS—GENERAL PRINCIPLES

- Sec. 140. Statutory Definitions of Unjust Discriminations and Undue Preferences.
- Sec. 141. Unlawful Discriminations and Preferences Between Shippers Under the Common Law.
- Sec. 142. Origin and History of Sections Two and Three of the Interstate Commerce Act.
- Sec. 143. Purpose and Object of Congress in the Enactment of Sections Two and Three.
- Sec. 144. Relations and Distinction Between Sections Two and Three.
- Sec. 145. Distinction between Section Two and Clause in Section One Prohibiting Unjust and Unreasonable Charges.
- Sec. 146. Statutory Conditions Rendered Difference in Charges Unlawful Under Section Two.
- Sec. 147. Circumstances and Conditions Determining Dissimilarity of Service Under Section 2 Refer Strictly to Matters of Carriage.
- Sec. 148. Unjust Discrimination and Preference Sections of Original Act Apply to Subsequent Amendments Defining Railroads and Transportation.
- Sec. 149. Distinction Between Ordinary Definition of Rebate and Meaning of That Term Under Provisions of Section Two.
- Sec. 150. Discrimination Under Section 3 Must Ordinarily be Prejudicial to One Party and Source of Advantages to the Other.
- Sec. 151. Relation of Discrimination Clause to the Elkins Act of 1903.
- Sec. 152. All Methods and Means Employed Unlawful if Ultimate Results Thereof Cause Unjust Discriminations.
- Sec. 153. Effect of Statute Upon Contracts with Discriminatory Provisions.
- Sec. 154. Terms "Unreasonable" or "Undue" Imply Comparison of all Facts and Circumstances Applicable.
- Sec. 155. Existence of Undue Preference or Unjust Discrimination a Question of Fact.
- Sec. 156. Strict Uniformity Not Always Required.
- Sec. 157. Long Existence of Undue Discrimination No Justification for its Continuance.
- Sec. 158. Prohibition Against Unjust Discrimination Covers Judgments by Consent and Waiver of Valid Defences.
- Sec. 159. Proof of Injury and Measure of Damages in Actions for Unlawful Discrimination.

§ 140. **Statutory Definitions of Unjust Discriminations and Undue Preferences.** Section 2 of the Act to Regulate Commerce provides that any common carrier charging, demanding, collecting or receiving, directly or indirectly, by any special rate, rebate, drawback or other device, from any person a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the Act, than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, shall be deemed guilty of unjust discrimination which is declared unlawful.

Section 3 of the Act prescribes that it shall be unlawful for any common carrier subject to the provisions of the Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and further prescribes that all common carriers shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but nothing in the statute shall be construed as requiring any common carrier subject to the Act to give the use of its tracks or terminal facilities to any other carrier engaged in like business.

These two sections formed an important part of the Interstate Commerce Act as originally enacted in 1887, and have remained in the statute since that time without any amendments or changes.

§ 141. **Unlawful Discriminations and Preferences Between Shippers Under the Common Law.** Before the passage of the Act to Regulate Commerce, railway traffic in this country was regulated by the principles of the common law applicable to common carriers except when modified by state statutes. Their charges for transportation were required to be reasonable, and when a carrier refused to receive goods except upon the payment of an unreasonable sum, the shipper had a right of action in damages;<sup>1</sup> but there was a conflict of opinion among the courts as to whether carriers were bound to make the same charge to all persons for the same service.<sup>2</sup>

Some courts, under the common law, held that the duty to carry for all did not require an equality of com-

1. **United States.** *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Tift v. Southern Ry. Co.*, 123 Fed. 789; *Mendoza v. Ward*, 27 Fed. 529.

**Illinois.** *Chicago & A. R. Co. v. People ex rel Koerner*, 67 Ill. 11, 16 Am. St. Rep. 599; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562.

**Maine.** *New England Exp. Co. v. Maine Cent. R. Co.*, 57 Me. 188, 2 Am. Rep. 31.

**New York.** *Killmer v. New York Cent. & H. River R. Co.*, 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. 293.

**Ohio.** *Scofield v. Lake Shore & M. S. Ry. Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907.

**Pennsylvania.** *Sanford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378, 64 Am. Rep. 667.

**South Carolina.** *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564.

**West Virginia.** *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

**Wisconsin.** *Smith v. Chicago & N. W. Ry. Co.*, 49 Wis. 443, 5 N. W. 240.

2. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315, in which the Court said: "Indeed it is exceedingly doubtful whether there was at common law any right of action for any sort of damages like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination. It thereby either first created the right or removed the doubt as to whether such suit could be brought."



pensation or charge, that is, that the carriers were not required to transport freight for all persons similarly situated for the same compensation;<sup>3</sup> while others held that all shippers had equal rights and that carriers were required to make the same charge to all persons for similar services.<sup>4</sup>

In a leading case decided in 1900 and before telegraph companies became subject to the Interstate Commerce Act, the United States Supreme Court held that the principles of the common law were operative upon all interstate commerce transactions, except in so far as they were modified by congressional enactment, and that common carriers were required to treat all patrons similarly situated on equal terms, but such equality of right did not prevent differences in modes and kinds of services and different charges based thereon. Applying

**3. United States.** *United States ex rel. Morris v. Delaware, L. & W. R. Co.*, 40 Fed. 101; *Menacho v. Ward*, 27 Fed. 529.

**California.** *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 18 L. R. A. 221, 28 Am. St. Rep. 142, 29 Pac. 873.

**Florida.** *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 26 Am. Rep. 731.

**Massachusetts.** *Spoffard v. Boston & M. R. Co.*, 128 Mass. 326; *Sargent v. Boston & L. R. Co.*, 115 Mass. 416; *Fitchburg R. Co. v. Gage*, 42 Gray (Mass.) 393.

**New York.** *Killmer v. New York Cent. & H. River R. Co.*, 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. 293.

**Pennsylvania.** *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 22 L. R. A. 263, 36 Am. St. Rep. 43, 27 Atl. 282.

**South Carolina.** *Ex parte Benson & Co.*, 18 S. C. 38, 44 Am. Rep. 564.

**Tennessee.** *Ragan v. Aiken & Buffet*, 9 Lea (Tenn.) 609.

In *Menacho v. Ward*, *supra*, the

Court, construing the rights of a common carrier under the common law, said: "Unquestionably a common carrier is always entitled to reasonable compensation for his services. Hence it follows that he is not entitled to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

**4. Atchison T. & S. F. R. Co. v. Denver, N. & O. R. Co.**, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; *Kinsley v. Buffalo, N. Y. & P. R. Co.*, 37 Fed. 181; *Handy v*

these principles, a judgment against an interstate telegraph company for discrimination between two patrons similarly situated for similar services, was sustained.<sup>5</sup>

**§ 142. Origin and History of Sections Two and Three of the Interstate Commerce Act.** Section 2 of the Interstate Commerce Act was modeled after an English statute passed in 1845 and known as Section 90 of the Railway Clauses Act of 1845.<sup>6</sup> The British statute was known as the "Equality Clause" governing railroads and canals. The American statute is far broader than the English law, for instead of the words "under substantially similar circumstances and conditions" found in Section 2, the British Act confines the carriage to that "passing only over the same portion of the line of railway under the same circumstances." Decisions by the British courts prior to 1887, when Section 2 was adopted, have frequently been cited by the national Supreme Court in construing the American Act.<sup>7</sup>

The English statute was as follows: "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic but that such

Cleveland & M.<sup>o</sup>R. Co., 31 Fed. 689; Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co., 31 Fed. 652; Missouri Pac. Ry. Co. v. Texas & Pac. Ry. Co., 30 Fed. 2; John Hays & Co. v. Pennsylvania Co., 12 Fed. 309; Christie v. Missouri Pac. Ry. Co., 94 Mo. 453, 7 S. W. 567; Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 531, 18 Am. Rep. 754.

This view of the courts is well expressed in *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754, as follows: "The business of the common carrier is for the public, and it is his duty to serve the public indifferently. \* \* \* In the very nature, then, of his duty, and of the public right,

his conduct should be equal and just to all. \* \* \* A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common law."

5. *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

6. *Trammel v. Clyde Steamship Co.*, 5 I. C. C. 324, 4 I. C. R. 121.

7. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect to all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."

Section 3 of the Interstate Commerce Act is a copy of the "undue preference clause" of the British Railway and Canal Act passed in 1854 as amended in 1873, with the exception that the word "locality" found in the American statute does not appear in the British law. The English Act provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."<sup>8</sup>

**§ 143. Purpose and Object of Congress in the Enactment of Sections Two and Three.** The congressional

8. Some of the English cases construing Section 3 are reviewed in Interstate Commerce Commis-

sion v. Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.



investigation preceding the passage of the Interstate Commerce Act, disclosed an elaborate system among common carriers of secret special rates, rebates, drawbacks, concessions and preferences. Shipments of importance were commonly made under special bargains entered into for the occasion. Favored shippers were enriched, and free competition was destroyed. Common carriers gave favors with the hope of gain and sought to control business by demands and concessions. Discrimination in rates between cities flourished so that some towns withered away and others became prosperous. The carriers encouraged the growth of large trade centers so that the traffic might be concentrated in large quantities and handled more cheaply by lowering the rates to these points and raising them to other cities not so fortunately favored. Free transportation was given to secure business and to obtain the favor of localities and public bodies.

Confronted with these evils, the purpose of Congress in the enactment of the second and third sections of the Act was, to cut up by the roots the entire system of rebates and discriminations in favor of particular localities or favored corporations;<sup>9</sup> to put all shippers on an absolute equality; to prevent unjust inequalities, partiality, favoritism or unfairness as between persons, traffic or localities similarly circumstanced;<sup>10</sup> to compel the carrier as a public agent to give equal treatment to all;<sup>11</sup> to prevent undue and unreasonable preferences to persons, corporations or localities;<sup>12</sup> to restrain the building up of one locality at the expense of another by rates favoring the former and discriminating against the latter;<sup>13</sup> to prevent unjust discrimination between

9. *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970.

10. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 37.

11. *New York, N. H. & H. R. Co. v. Interstate Commerce Commis-*

*sion*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272.

12. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003.

13. *Hampton Board of Trade v. Nashville, C. & St. L. Ry.*, 8 I. C. C. 503.



shippers;<sup>14</sup> to prohibit unjust discriminations in the rendition of like services under similar circumstances;<sup>15</sup> to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any devices from enforcing higher charges against one than another;<sup>16</sup> to restrain the carrier from giving any shipper privileges or charges in connection with the transportation of its property that were withheld from its competitor;<sup>17</sup> and to forbid any advantage of one locality over another not arising out of differences in transportation conditions.<sup>18</sup>

The underlying purpose of this legislation was to insure shipper not only equal rates but an impartial enjoyment of the facilities and services of interstate common carriers. By section 2, the shipper is assured an equality of rates for the transportation of like traffic under substantially similar circumstances, and by section 3 he is assured an equality in the opportunity to use the rates, facilities and services of a carrier. One section supplements the other. An equality in rates without an equal opportunity to use the facilities of the carrier, would fall short of the object sought to be attained by Congress.<sup>19</sup>

**§ 144. Relation and Distinction Between Sections Two and Three.** Section 2 prohibits unjust discrimination in rates between shippers of like traffic and services of transportation under substantially similar conditions. It was aimed primarily at the wholesale discrimination by rebate so prevalent at the time of the passage of the Act.<sup>20</sup> Section 3 is far broader in its

14. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666.

15. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

16. *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822.

17. *Federal Sugar Refining Co. v. Baltimore & O. R. Co.*, 20 I. C. C. 200.

18. *Railroad Commission of Louisiana v. St. Louis S. W. Ry. Co.*, 23 I. C. C. 31.

19. *Rail & River Coal Co. v. Baltimore & O. R. Co.*, 14 I. C. C. 86.

20. *Re Underbills*, 1 I. C. R. 813.

scope than section 2. It prohibits all unreasonable preferences or advantages for or against localities, and between kinds of traffic as well as discriminations between shippers not only as to rates but as to other services and advantages as well.

Section 2 deals principally with discriminations among shippers as to rates. Section 3 covers discriminations and preferences among shippers as to all services other than rates, and also with preferences between localities and kinds of traffic. Since both sections require equality of service as to shippers and localities under similar conditions, they may be conveniently treated together as the same principles largely govern in the application of both to the multifarious facts of interstate transportation.

**§ 145. Distinction between Section Two and Clause in Section One Prohibiting Unjust and Unreasonable Charges.** The reasonableness of a rate is not necessarily involved in determining unjust discrimination under section 2. Section 1 requires the carrier to provide and furnish transportation upon reasonable request therefor and to establish just and reasonable rates applicable thereto; but a rate may be reasonable and just under requirements of section 1 and yet be unlawful under the provisions of sections 2 and 3 as to a shipper because of an unjust discrimination. A rate, therefore, must run two gantlets; it must be reasonable under the requirements of section 1, and it must be non-discriminatory under the provisions of section 2.<sup>21</sup>

When it is sought to show that the charges for any service rendered by a railroad company is extortionate as being contrary to the obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge dur-

21. *Kinavey v. Terminal Railroad Ass'n*, 81 Fed. 803.

ing the same period throughout which the party complaining was charged more under like circumstances.<sup>22</sup>

**§ 146. Statutory Conditions Rendered Difference in Charges Unlawful Under Section Two.** A carrier does not violate the provisions of section 2 in demanding or receiving a greater compensation for services rendered, from one shipper than another unless, first, the services rendered in the transportation of persons or property are like and contemporaneous; second, the services are rendered in the transportation of a like kind of traffic, and, third, the services are rendered under substantially similar circumstances and conditions.<sup>23</sup> If, therefore, the services rendered to shippers are not like and contemporaneous, or if the traffic carried for each of them is not of a like kind, or if the transportation is made under circumstances and conditions substantially dissimilar, the demand or collection of a greater compensation from one than the other, does not constitute an unjust discrimination.

In order for the services to be "like" they must be rendered at least over the same line.<sup>24</sup> The expression "like kind of traffic" does not mean that all classes of livestock, for example, must be transported at the same rate, and, therefore, a higher charge for the transportation of sheep than for the carriage of cattle under simi-

22. Statement of Mr. Justice Blackburn in *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, approvingly cited in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

23. *Penn Refining Co., Ltd. v. Western New York & P. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, 23 Sup. Ct. 268; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Interstate Commerce*

*Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Union Pac. Ry. Co. v. United States*, 117 U. S. 355, 29 L. Ed. 920, 6 Sup. Ct. 772; *United States v. Hanley*, 71 Fed. 672; *United States ex rel. Morris v. Delaware, L. & W. R. Co.*, 40 Fed. 101; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 2 L. R. A. 289.

24. *Cattle Raisers' Association of Texas v. Fort Worth & D. C. Ry. Co.*, 7 I. C. C. 513.

lar circumstances does not constitute an unjust discrimination.<sup>25</sup>

**§ 147. Circumstances and Conditions Determining Dissimilarity of Service Under Section 2 Refer Strictly to Matters of Carriage.** In determining whether discrimination exists in violation of section 2, the phrase "under substantially similar circumstances and conditions" does not include extraneous conditions or circumstances not affecting the haulage or carriage. Considerations beyond the actual carriage itself or the transportation service of the carrier, cannot be permitted to create dissimilar conditions.<sup>26</sup>

The phrase in question does not allow carriers to make a difference in rates because of a dissimilarity in circumstances arising either before the service of the carrier began or after it was terminated.<sup>27</sup> If the carrier were allowed to take into consideration matters not relating to the actual carriage itself, to create dissimilar circumstances, the interests or the personal relation of the shippers to the carrier both before and after the transportation, would create justifiable conditions under the statute and thus open the way for preferences among them.<sup>28</sup>

**§ 148. Unjust Discrimination and Preference Sections of Original Act Apply to Subsequent Amendments Defining Railroads and Transportation.** While sections 2 and 3 of the Act defining and prohibiting unjust discrimination and undue preference were a part of the original Act and have remained in the statute without amendment, these provisions apply with equal force to

25. *Wynn v. Wabash R. Co.*, 111 Mo. App. 642, 86 S. W. 562.

26. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. 742, Ann. Cas. 1914A 504; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct.

45; *In re Restricted Rates*, 20 I. C. C. 426.

27. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

28. *Pennsylvania R. Co. v. International Coal Min. Co.*, 97 C. C. A. 383, 173 Fed. 1.



new subject matters brought within the jurisdiction of the Interstate Commerce Commission by amendments and must be construed in connection with these amendments and subsequent provisions.

For example, the original definition of transportation in the Act was amended in 1906 so as to include all service in connection with the receipt, delivery, elevation, transfer in transit, ventilation, refrigeration, storage and handling of property transported, and the definition of the term railroad in the original Act was amended at the same time so as to include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated in the Act, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property.

It therefore follows that the provisions of sections 2 and 3 must be read in connection with subsequent amendments which show the transportation as used in the Act covers the entire carriage and service in connection with the receipt and delivery of property transported. The prohibition against undue discriminations and undue preferences apply to terminal facilities of every kind and character, including the delivery and interchange of cars at such terminals.<sup>29</sup>

**§ 149. Distinction Between Ordinary Definition of Rebate and Meaning of That Term Under Provisions of Section Two.** While the word "rebate" ordinarily includes any discount or deduction from a stipulated payment, charge or rate not taken out in advance of payment but handed back to the payer after he has paid the stipulated sum, the meaning of that term as used in the equality clause of section two is plainly limited to such sums as are refunded to one shipper for like services under similar conditions without a similar re-

29. *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370.

fund to another. In other words, the term as used in this statute refers only to such discount, deduction or drawback as is the basis of a discrimination in favor of a particular person and against other persons in like situations, and destroys that equality of treatment in rates or charges to which the public is entitled. A rebate is not illegal under section 2 unless it produces the discriminatory result defined in the statute. For example, it has been held that a deduction of two cents per hundred pounds for transfer on shipments of sugar in carload lots, from the through rate when destined to certain termini, applicable to all shippers without discrimination, did not constitute a rebate within the terms of the statute.<sup>30</sup>

**§ 150. Discrimination Under Section 3 Must Ordinarily be Prejudicial to One Party and Source of Advantage to the Other.** Under section 3 of the Act, the discrimination, to be undue and unlawful, must ordinarily be such that the prejudice resulting against one party is a source of advantage to the other alleged to be favored. For example, an unlawful discrimination is not shown by proof that carriers refuse to absorb switching charges on grain, while absorbing such charges in the cases of other commodities which have no competitive relation with grain.<sup>31</sup> And so proof that carriers at Chicago did not furnish assistance in the unloading of fruit and vegetables in carload lots while furnishing the same service at Milwaukee or *vice versa*, does not create a discrimination that is undue or unreasonable for the same reason.<sup>32</sup>

**§ 151. Relation of Discrimination Clause to the Elkins Act of 1903.** The provisions of section 2 prohibiting unjust discriminations were materially strengthened

30. *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, 11 New York, N. H. & H. R. Co., 11 I. C. C. 422.

125 C. C. A. 251, 207 Fed. 733.

32. *Board of Trade of St. Paul*

31. *Board of Trade of Chicago, v. Chicago, M. & St. P. Ry. Co.*, 17 Ill. v. Atchison, T. & S. F. R. Co., I. C. C. 596.

29 I. C. C. 438; See also *Miner v.*

by the passage of the Elkins Act of 1903.<sup>33</sup> Under section 2 the determinative factor as to violation is whether the carrier charged one shipper more than another. The standard of comparison was the treatment of other shippers. The party upon whom the burden of proof rested was required to show that the favored shipper paid less than the other shipper for similar services; but under the Elkins Act the standard of comparison is the published rate, and if a carrier is shown to have permitted any shipper to transport his property at less than the published rate, both are guilty of a misdemeanor. Any departure from the published rate is an offense. The filed and published rate is conclusively deemed to be the legal rate.

**§ 152. All Methods and Means Employed Unlawful if Ultimate Results Thereof Cause Unjust Discriminations.** All means or methods however skillfully planned by which an unlawful result is effected, are devices condemned by the statute. In ascertaining whether the carrier unjustly discriminates or is guilty of undue preferences, the law deals with the results produced, and it is not material what means may be employed for that purpose. If they in fact culminate in what the law forbids, it is of no importance that the means be direct or indirect, open or covert.

If the result is unlawful, the inhibition of the statute falls alike upon the result itself and the means by which it is reached, and the parties engaged in the transportation must be presumed to have intended by their acts the breach of the law that ensues as a necessary consequence. Thus, where a firm of cattle dealers organized a separate corporation for the purpose of supplying a carrier with improved stock cars for the transportation of its stock from Chicago to New York for which the carrier paid a very high rental and extraordinary mileage amounting, in fact, to a rebate on their rates,

33. See Appendix B, *infra*.

the Commission held the arrangement to be an unlawful preference condemned by the statute.<sup>34</sup>

**§153. Effect of Statute Upon Contracts with Discriminatory Provisions.** All contracts existing at the time of the passage of the Interstate Commerce Act, the provisions of which required a carrier to discriminate either for or against any shipper, became void under the statute.<sup>35</sup> Likewise all such contracts entered into since the passage of the Act are not enforceable and render the carrier, when a party to the same, liable to punishment for undue discrimination.<sup>36</sup>

**§154. Terms "Unreasonable" or "Undue" Imply Comparison of all Facts and Circumstances Applicable.** In determining whether any rate is unjust or unreasonable or whether any person, locality or kind of traffic is subjected to any undue or unreasonable prejudice or disadvantage the tribunals appointed to enforce the provisions of the statute, whether the Commission or the courts, should take into consideration all the facts and circumstances which bear upon the relation of the rates between the shippers and to different communities.

34. *Shamberg v. Delaware L. & W. R. Co.*, 3 I. C. R. 502, 4 I. C. C. 630. To the same effect; *Muskogee Commercial Club v. Missouri, K. & T. Ry. Co.*, 12 I. C. C. 312.

35. *United States. Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. Ed. 126, 29 Sup. Ct. 42.

*Iowa. Gatton v. Chicago, R. I. & P. R. Co.*, 35 Iowa 112, 29 L. R. A. 556, 63 N. W. 589.

*Kentucky. Louisville & N. R. Co. v. Crowe*, 156 Ky. 27, 49 L. R. A. (N. S.) 848, 160 N. W. 759.

*Nebraska. Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

*Washington. Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 41 L. R. A. (N. S.) 559, 123 Pac. 998.

*West Virginia. Dorr v. Chesapeake & O. Ry. Co.*, — W. Va. —, 88 S. E. 666.

36. *Alabama. Louisville & N. R. Co. v. Jones*, 6 Ala. App. 617, 6 N. C. C. A. 43, 60 So. 945.

*Georgia. Savannah, F. & W. Ry. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995.

*Kansas. Chicago, R. I. & P. Ry. Co. v. Hubbell*, 54 Kan. 232, 38 Pac. 266.

*Kentucky. Illinois Cent. R. Co. v. Fleming*, 148 Ky. 473, 146 S. W. 1110.

*Missouri. Southern Wire Co. v.*



When Congress enacted that one locality should not have undue preferences in rates or facilities over another locality, or be subjected to any unreasonable prejudice or disadvantage, it opened the door for, and made material, any evidence which tends to throw light upon the question of undue preference or prejudice. The terms of the statute imply comparison of relative locations, of natural and acquired advantages, of the reasonableness of charges *per se* and their relation to other rates on the various lines which serve the competing localities.<sup>37</sup>

Both the courts and the Commission in passing upon questions arising under the Act are empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and, in addition, they should consider the legitimate interests not only of the carriers but also of shippers. In considering whether any locality is subjected to an undue preference, the welfare of the communities occupying the localities where the goods are delivered must be considered as well as that of the communities which are in the locality of the place of shipment.<sup>38</sup>

**§ 155. Existence of Undue Preference or Unjust Discrimination a Question of Fact.** The second section does not define or describe what constitutes a sim-

St. Louis Bridge & Tunnel R. Co., 38 Mo. App. 191; *Christie v. Missouri Pac. Ry. Co.*, 94 Mo. 453, 7 S. W. 567.

**Montana.** *Bullard v. Northern Pac. R. Co.*, 10 Mont. 168, 11 L. R. A. 246, 25 Pac. 120.

**South Dakota.** *Church v. Minneapolis & St. L. Ry. Co.*, 14 S. D. 443, 85 N. W. 1001.

**Vermont.** *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76.

37. *Daniels v. Chicago, R. I. & P. R. Co.*, 6 I. C. C. 458; *Chamber of Commerce of Minneapolis v.*

*Great Northern Ry. Co.*, 4 I. C. R. 230, 5 I. C. C. 571; *Board of Trade of Eau Claire v. Chicago, M. & St. P. R. Co.*, 4 I. C. R. 65, 5 I. C. C. 264; *Board of Trade of Lincoln v. Missouri P. R. Co.*, 2 I. C. R. 98, 2 I. C. C. 155; *Raymond v. Chicago, M. & St. P. R. Co.*, 1 I. C. R. 627; 1 I. C. C. 230; *Board of Trade of Farmington v. Chicago, M. & St. P. R. Co.*, 1 I. C. R. 608, 1 I. C. C. 215.

38. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666.

ilarity or dissimilarity of circumstances and conditions. Neither does the third section define when a preference shall be undue or unreasonable. The question, therefore, under these two sections whether a shipper, community or traffic has been subjected to an undue preference or an unjust discrimination is an issue of fact in each particular case and not a question of law.<sup>39</sup>

### § 156. Strict Uniformity Not Always Required.

The statute requires that discriminations shall not be unjust, and that preferences and advantages as to any particular firm or locality must not be undue. This necessarily implies that strict uniformity is and must not always be enforced, but all the surrounding facts and circumstances affecting the carrier and the shipper should be considered.<sup>40</sup> Thus, the Commission held that

39. *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 27 Sup. Ct. 272; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666.

40. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666, in which the court said: "The third section forbids any undue or unreasonable preference or advantage in favor of any person, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or

unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard

a shipper manufacturing lumber at Monroe, La., was not entitled to the application of transit rules exactly similar to those in effect at Vicksburg and Jackson, Miss.<sup>41</sup> "It must be remembered that not every inequality in rates constitutes a violation of the law. Discrimination is forbidden only when it is unjust. Preferences and prejudices are not prohibited unless they are undue."<sup>42</sup>

**§ 157. Long Existence of Undue Discrimination No Justification for its Continuance.** That the undue discrimination or unjust preference in violation of the statute, had existed for a long time without correction, does not justify the discrimination or preference; for a just equality of trade for shipper and locality is required by the law, and the statute was passed mainly to abolish the unjust discriminations between persons, places, commodities and traffic which had continued for many years as the paramount evil chargeable against the rail carriers prior to federal regulation.<sup>43</sup> "The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the Interstate Commerce Act was passed."<sup>44</sup> Time cannot be permitted to deprive a group of commodities of their right to relief from what, in view of changed conditions, will be a manifest rate discrimination if further continued.<sup>45</sup>

**§ 158. Prohibition Against Unjust Discriminations Covers Judgments by Consent and Waiver of Valid**

only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question."

41. *Adams & Sons Co. v. Vicksburg, S. & P. Ry. Co.*, 29 I. C. C. 52.

42. *Eagle Distillery v. Louisville, H. & St. L. Ry. Co.*, 32 I. C.

C. 195; *Commerce Club of Omaha v. Chicago & N. W. R. Co.*, 7 I. C. C. 386.

43. *Kaufman Commercial Club v. Chicago & N. W. R. Co.*, 7 I. C. 167.

44. Judge Taft in *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 39 C. C. A. 413, 99 Fed. 52.

45. *State of Iowa v. Atchison T. & S. F. R. Co.*, 28 I. C. C. 47.

**Defenses.** The statute against unjust discriminations and undue preferences not only includes inequality of charges and facilities, but is also directed against the giving of any preferences by means of judgments against the carrier by consent and by the waiver of defenses available to the carrier. To permit a railroad company, for example, to plead the statute of limitation against one shipper and waive it against another, would be an undue preference against the one and an advantage for the other in violation of the statute which forbids all devices by which such a result may be accomplished.<sup>46</sup>

**§ 159. Proof of Injury and Measure of Damages in Actions for Unlawful Discrimination.** Any common carrier subject to the statute, committing any act or omitting to do any act in violation of sections 2 and 3 of the statute prohibiting unjust discrimination and unreasonable preference, is liable to the person injured for the full amount of the damages sustained in consequence of such violation, together with a reasonable attorney's fee, to be fixed by the court in every case of a recovery which may be taxed and collected as a part of the costs in the case.<sup>47</sup>

A party suing for damages for violation of these two sections, must not only show the wrong, but he must further prove that the wrong operated to his injury.<sup>48</sup>

46. *Phillips v. Grand Trunk Western R. Co.*, 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. 444.

47. Section 8, appendix A, *infra*.

48. *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887, in which Mr. Justice Brewer said: "The only right of recovery given by the interstate commerce act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover

under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable or mere possibilities. We think, therefore, without attempting to take judicial knowledge of the general order made by the Inter-



The measure of damages in actions by shippers against carriers for unlawful discrimination, was a question upon which courts formerly disagreed, and the conflict of opinion was not definitely removed until the controlling decisions of the United States Supreme Court in *Pennsylvania R. Co. v. International Coal Min. Co.*<sup>49</sup> In that case a shipper, without proving that he sustained any damage, sought to recover damages from a carrier for giving a rebate to another shipper. The shipper contended that the damages should be assessed on the basis of giving to it the same rate on all its tonnage that had been allowed to other shippers on coal transported, that is, that the plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury. But the court refused to adopt this view and held that the right to recover is limited strictly to the pecuniary loss suffered and proven. In rejecting plaintiff's theory, the court said: "To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate

state Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the interstate commerce act."

49. 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315. See also *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473,

59 L. Ed. 1414, 35 Sup. Ct. 888; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, Ann. Cas. 1916B 691; *Pennsylvania R. Co. v. W. F. Jacoby & Co.*, 242 U. S. 89, 61 L. Ed. 165, 37 Sup. Ct. 49; *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. 46.

offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the inference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid.”

## CHAPTER IX

### DISCRIMINATIONS BETWEEN SHIPPERS AS TO RATES, SERVICES, FACILITIES AND ALLOWANCES

- Sec. 160. Carrier Must Deal with All Its Shippers on Absolute Equality and Must Afford Equal Facilities.
- Sec. 161. Difference in Rates When Based Upon Difference in Service Not Discriminatory.
- Sec. 162. Different Rates for Wholesalers and Retailers Prohibited.
- Sec. 163. Rates for Train Loads Lower Than for Single Car Loads Subject Small Shippers to Undue Disadvantage.
- Sec. 164. Higher Rates on Domestic Than on Export Traffic Between Ports of Entry and Inland Points not Discriminatory.
- Sec. 165. Doctrine of Import Case Applied and Illustrated.
- Sec. 166. Use of Terminal Facilities by Permitting Interchange of Traffic with one Carrier and Denying it to Another.
- Sec. 167. Discrimination in Reserving Right to Route Through Shipments Beyond Carriers Terminal—Former and Present Rule.
- Sec. 168. Discrimination in Refusal of Rail Carriers to Establish Through Routes and Joint Rates with Water Lines.
- Sec. 169. Exclusive Privileges for Auxiliary Facilities at Stations and Terminal Grounds Lawful.
- Sec. 170. Distribution of Cars Among Shippers During Time of Shortage Must be Free from Discrimination.
- Sec. 171. Preferences and Discriminations in Demurrage and Track Storage Charges.
- Sec. 172. Unreasonable Compensation to Shippers for Services in Connection with Transportation.
- Sec. 173. Abnormal Division of Joint Rates to Carriers Unlawful.
- Sec. 174. Undue Discrimination in Divisions of Joint Through Rates to Tap Lines or Logging Roads.
- Sec. 175. Grant of Wharfage Privileges to One Shipper Denied to Others Unlawful.
- Sec. 176. Unlawful Discriminations and Preferences in Transit Privileges.
- Sec. 177. Compensation for Transit Privileges Not Limited to Actual Cost.
- Sec. 178. Extension of Transit Privileges Over Twelve Months Unreasonable—Exceptions Permitted.
- Sec. 179. Carriers May Allow Compensation to One Shipper for Transportation Services and Deny Same Privilege to Another.
- Sec. 180. Contracts Requiring Expedited Services Not Open to All Shippers Invalid.
- Sec. 181. Preferential Rates to Other Carriers as Shippers Prohibited.

- Sec. 182. Foregoing Rules Illustrated and Applied.
- Sec. 183. Storage Regulations Must Be Enforced Without Preference or Discrimination.
- Sec. 184. Haulage by Stage or Wagon from Destination Points not a Dissimilar Circumstance justifying Lower Rates.
- Sec. 185. Preparing Cars for Shipment of Commodities for Some Shippers and Refusing Same Service to Others.
- Sec. 186. Grain Elevator Service Must be Open to All Shippers Without Preference.
- Sec. 187. Allowances When Owner of Elevator is Shipper of Grain—Former and Present Rule.
- Sec. 188. Allowances for Lighterage Services to Shipper Within Free Delivery Zone not Discriminatory as to Shipper Beyond Zone.
- Sec. 189. Rebating Part of Freight Rates in Payment for Land for Right of Way.
- Sec. 190. Assisting One Shipper to Collect Private Charges and Refusing Same Service to Another.
- Sec. 191. Discrimination in Demanding Cash Payment of Some Shippers and Extending Credit to Others—Conflicting Decisions.
- Sec. 192. Deduction from Freight Rates to Pay Shipper for Building Tie Hoist Invalid.
- Sec. 193. Difference in Rates on Freight Not Justified by Different Method of Loading.
- Sec. 194. Carrier "Spotting" Cars for One Shipper and Refusing Same Service to Another Similarly Situated.
- Sec. 195. Trap Car Service Not Unlawful If Practiced Without Discrimination.

**§ 160. Carrier Must Deal with All Its Shippers on Absolute Equality and Must Afford Equal Facilities.** The statute recognizes that it is not a proper business of a common carrier to foster particular enterprises or to build up new industries by discriminatory practices and unjust preferences. Deriving its franchises from the state, and depending upon the law of the people for its existence, a carrier is bound to deal fairly with the public, to extend to them reasonable facilities for the transportation of persons and property, and to put all their patrons on an absolute equality.<sup>1</sup>

The carrier is bound by every principle of justice and law to accord equal rights to all shippers who are

1. *Union Pac. Ry. Co. v. Goodridge*, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970.



entitled to like treatment, both in the receiving of supplies and shipment of their products, and a carrier who, under any pretext whatever, grants to one shipper an advantage which it denies to another, violates the spirit and thwarts the purpose of the statute.<sup>2</sup>

When, therefore, two railroad companies, joint owners of a connecting spur terminating at a dock, make a charge of two dollars per car against one shipper from a point on the dock in addition to the published rate, and make no similar charge against another shipper similarly situated, such a practice constitutes an unjust discrimination in violation of the statute.<sup>3</sup> And where it appeared that a brewing company, a large shipper, organized a separate transit company which received commission from a carrier under the pretense that such demands were made for soliciting business for the carrier, the whole scheme, it was held, was a mere device to evade the statute against discrimination.<sup>4</sup>

2. *Castle v. Baltimore & O. R. Co.*, 8 I. C. C. 333.

3. *Ohio Coal Co. v. Whitcomb*, 59 C. C. A. 487, 123 Fed. 359.

4. *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, in which the Court said: "Immediately on the creation of the transit company the Pabsts, as controlling officers of the brewing company, contracted with themselves as executive officers of the transit company, for a term not yet expired, to give the latter exclusive control of the shipment of all freight of the brewing company moving in interstate and foreign commerce, which it is still exercising. The contract was made to enable the transit company to route the shipment of such freight on the lines of such companies as will pay rebates, and withhold it from such as will not; and all the rebates, concessions, and discriminations charged in the bill

have been exacted by threats of such diversion. Many thousand tons of said freight have been hauled by defendant carriers since the contract was made. On such shipments the brewing company pays to the carriers the full tariff rate, and the carriers pay the transit company for the use of its refrigerator cars for mileage three-fourths of a cent to a cent per mile, and in addition an eighth or tenth of the sums paid them by the brewing company; and in every instance the property is transported by defendant carriers at an eighth or tenth less than the published tariff. Such rebates amount to many thousands of dollars, the exact sum unknown to complainants. All the defendant carriers well knew that the transit company was organized in the interest of the brewing company, and for the purpose of evading the law, and paid such rebates with

§ 161. **Difference in Rates When Based Upon Difference in Service Not Discriminatory.** For a like service the public is entitled to a like price; but the principle of equality among shippers similarly situated does not forbid a difference in charge which is based upon a difference in service. The charge, however, when based upon a difference in service should have a reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination.<sup>5</sup>

An advantage accorded which fixes the value of the service to the shipper and its cost to the carrier may be made, provided such a special service is open to all others similarly situated.<sup>6</sup> Thus the greater cost of carriage and risk of injury constitute a difference which entitles a carrier to charge a higher rate for carrying

the like purpose and intent. The transit company claims and pretends that such repayments were made and accepted as compensation for its services in soliciting and procuring freight for carriage by defendants; but such claim or pretense is untrue. The transit company has entire control of all the shipping business of the brewery, comprising almost the entire business of the transit company, which it does not solicit; the only possible consideration moving from it to the carrier being its refraining to divert the business. All such repayments have always been known to all said parties to be a device for unlawful rebate, concession, and discrimination. But such payments constitute unlawful concession and discrimination, whether or not the transit company solicits the shipments, which, if not so solicited and procured, would be diverted from the carrier so paying."

5. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493; *Penn Re-*

*fining Co. v. Western New York & P. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268; *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648; *Western U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct. 561; *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 37; *Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co.*, 31 Fed. 652; *Cator v. Southern P. Co.*, 6 I. C. C. 113, 4 I. C. R. 397; *Rice v. Cincinnati, W. & B. R. Co.*, 5 I. C. C. 193, 3 I. C. R. 841; *Savery & Co. v. New York Cent. & H. River R. Co.*, 2 I. C. C. 338, 2 I. C. R. 210.

6. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A

livestock than for carrying livestock products.<sup>7</sup> In fact, the circumstances which produce an inequality of conditions, justifies an inequality of charges.<sup>8</sup>

When a carrier renders a special service, such as rapid transit and speedy delivery of perishable freight, it is justified in charging a higher rate than for the transportation of ordinary freight.<sup>9</sup> A higher charge for the transportation of oil in tank cars than for the carriage of oil in barrels has been justified.<sup>10</sup> Differences in charges and rates may, therefore, be made in proportion to the cost and value of the service.<sup>11</sup>

501, in which the court said: "But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract. For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done. The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence. An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation. \* \* \* The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application.

That purpose would be defeated if sanction is given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs."

7. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493.

8. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

9. *Loud v. South Carolina Ry. Co.*, 5 I. C. C. 529, 4 I. C. R. 205.

10. *Penn Refining Co. v. Western New York & P. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268.

11. *Kansas Pac. Ry. Co. v. Bayles*, 19 Colo. 348, 35 Pac. 744; *Bayles v. Kansas Pac. R. Co.*, 13 Colo. 181, 5 L. R. A. 480, 22 Pac. 341; *Scofield v. Lake Shore & M. S. Ry. Co.*, 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907; *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362, 26 Atl. 315.



§ 162. **Different Rates for Wholesalers and Retailers Prohibited.** Arrangements or contracts with common carriers whereby persons shipping a larger amount of traffic should have their goods carried on more favorable terms than those shipping a less quantity, were formerly upheld,<sup>12</sup> but are now generally condemned as being unjustly discriminative.<sup>13</sup>

If such a rule were established among railroads, the small shippers would soon be eliminated. To grant one shipper a lower rate than his competitor in business solely because he is able to furnish, and does furnish a larger quantity for shipment, would force the small competitor to abandon the unequal contest and destroy the equality of treatment which is the purpose of the statute.<sup>14</sup>

While it is true that the services for the large dealer would be somewhat less in proportion to the freight carried than for like services for the small dealer,

12. **United States.** John Hays & Co. v. Pennsylvania Co., 12 Fed. 309.

**Illinois.** Savitz v. Ohio & M. R. Co., 150 Ill. 208, 37 N. E. 235, aff'g 49 Ill. App. 315.

**Iowa.** Cook v. Chicago, R. I. & P. Ry. Co., 81 Iowa 551, 9 L. R. A. 764, 25 Am. St. Rep. 512, 46 N. W. 1080.

**Missouri.** Rothschild v. Wabash St. L. & P. Ry. Co., 92 Mo. 91, 4 S. W. 418.

**New Hampshire.** Concord & P. R. Co. v. Forsaith, 59 N. H. 122, 47 Am. Rep. 181.

**New York.** Silkman v. Board of Water Com'rs of City of Yonkers, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612.

**Vermont.** State v. Central Vermont R. Co., 81 Vt. 463, 130 Am. St. Rep. 1065, 71 Atl. 194.

13. **United States** v. Tozer, 39 Fed. 369; Kinsley v. Buffalo, N. Y. & P. R. Co., 37 Fed. 181; Planters' Compress Co. v. Cleveland, C.

C. & St. L. Ry. Co., 11 I. C. C. 382; Glade Coal Co. v. Baltimore & O. R. Co., 10 I. C. C. 226; Paine Bros. & Co. v. Lehigh Valley R. Co., 7 I. C. C. 218; Re Alleged Unlawful Charges for Transportation of Coal, 5 I. C. C. 466, 4 I. C. R. 157; Harvard Co. v. Pennsylvania Co., 4 I. C. C. 212, 3 I. C. R. 257.

14. **Burlington, C. R. & N. Ry. Co. v. Northwestern Fuel Co.**, 31 Fed. 652; **Scofield v. Lake Shore & M. S. Ry. Co.**, 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. 907. In these two cases, the courts approved the following statement of the law by Judge Baxter: "The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of railroad officials; for if one man engaged in mining coal,



this is but an item of reduced cost that can only be permitted in strict subordination to the rules of law which forbid discrimination between dealers.<sup>15</sup> "But when a question of rebates or discounts is under consideration," said Commissioner Cooley in the last case cited, "it might be misleading to consider them in the light of

and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from twenty-five to fifty cents per ton less than another competing with him in business, solely on the ground that he is able to furnish, and does furnish, a larger quantity for shipment, the small operator will, sooner or later, be forced to abandon the unequal contest, and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities and, perhaps, tempted to favor their friends to the detriment of their personal or political opponents; or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or

against them; or else, seeing the augmented power of capital, organize into overshadowing combinations, and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say, these results might follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them. They have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

15. *Providence Coal Co. v. Providence & W. R. Co.*, 1 I. C. C. 107, 1 I. C. R. 363.

the principles which merchants act upon in the case of wholesale and retail transactions. There is a very manifest difficulty in applying those principles to the conveniences which common carriers furnish to the public, a difficulty which springs from the nature of the duty which such carriers owe to the public. That duty is one of entire partiality of service. The merchant is under no corresponding duty, and may make his rules to suit his own interest, and discriminate as he pleases. There is no occasion to enlarge upon this now. A discrimination, such as the offer and its acceptance by one or more dealers would create, must have a necessary tendency to destroy the business of small dealers. Under the evidence in the case it appears almost certain that this destruction must result, the margin for profit on wholesale dealings in coal being very small. The discrimination is therefore necessarily unjust within the meaning of the law. It cannot be supported by the circumstance that the offer is open to all; for although made to all, it is not possible that all should accept."

**§ 163. Rates for Train Loads Lower than for Single Car Loads Subject Small Shippers to Undue Disadvantage.** Lower rates on train load shipments than on carloads have generally been condemned for such a distinction violates the principle of equality between shippers and tends to defeat its just and wholesome purpose.<sup>16</sup> The fact that certain traffic is hauled in train loads, the Commission has held, cannot be made the basis of rates different from those applied to shipments in single carloads.<sup>17</sup> In *Paine Bros. & Co. v. Lehigh Valley R. Co.*,<sup>18</sup> it appeared that the carriers put into effect on grain from western points to Buffalo by the Great Lakes and destined for certain Atlantic ports

16. *Rickards v. Atlantic C. L. R. Co.*, 23 I. C. C. 239; *Carstens Packing Co. v. Oregon Short L. R. Co.*, 17 I. C. C. 324; *Planters' Compress Co. v. Cleveland. C. C. & St. L. Ry. Co.*, 11 I. C. C. 382.

17. *Woodward-Bennett Co. v. San Pedro, L. A. & S. L. R. Co.*, 29 I. C. C. 664.

18. *Paine Bros. & Co. v. Lehigh Valley R. Co.*, 7 I. C. C. 218.

lower rates for cargo lots of 8,000 bushels or over than for lots of less than said specified number of bushels. It was contended that such rates gave the larger dealer a monopoly of the business and subjected the complainant, a shipper of small quantities, to unreasonable prejudice and disadvantage in violation of section 3. In condemning such distinctions in rates, the Commission said:

“But conceding that lower rates on export than on domestic grain may be properly allowed, we perceive no sufficient reason for different rates on carload than on cargo or train load shipments, whether grain is carried for export or domestic use. The principle involved in such a distinction violates the rule of equality and tends to defeat its just and wholesome purpose. That purpose is not fully accomplished if one scale of charges is applied to cargo shipments and a higher rate is imposed for single carloads, even though all cargo shippers pay the same and all carload shippers are charged alike.”

**§ 164. Higher Rates on Domestic Than on Export Traffic Between Ports of Entry and Inland Points not Discriminatory.** The provisions of the second section prohibiting “unjust” discriminations imply that, in deciding whether differences in charges, in given cases, are unjust, there must be a consideration of the several questions whether the services rendered were “like and contemporaneous,” whether the kinds of traffic were “like” and whether the transportation was effected under “substantially similar circumstances and conditions.” Conditions existing abroad, as well as those existing in the United States, should be considered. The interest of the carrier and the consuming community as well as the producing community must be taken into account.

There is, therefore, no hard and fast rule which prohibits a carrier in furtherance of its own interest and the interests of its patrons, from accepting a less sum for the transportation of imported merchandise from a port of entry to an interior point or the trans-

portation of export traffic from an interior point to a port of transshipment than it does for the transportation of domestic merchandise between the same points.<sup>19</sup> Among the circumstances and conditions to be considered in determining the relative rates on traffic originating in foreign ports and traffic originating within the limits of the United States are competition, and lower rates to secure foreign freight which would otherwise go by other competitive routes are not undue or unjust.<sup>20</sup>

**§ 165. Doctrine of Import Case Applied and Illustrated.** Following the decision of the Supreme Court in *Texas & P. Ry. Co. v. Interstate Commerce Commis-*

19. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Kemble v. Lake Shore & M. S. Ry. Co.*, 8 I. C. C. 110.

20. *Pittsburgh Plate Glass Co. v. Pittsburgh, C. C. & St. L. Ry. Co.*, 13 I. C. C. 87, in which Commissioner Clements said: "It is clear that in considering the question of alleged unjust discrimination in favor of shippers of import glass moving from the ports of entry in this and adjacent foreign countries to interior American destinations, and against domestic shipments of glass between points in the United States, it is the duty of the Commission to look to the circumstances and conditions affecting the matters involved, not only in this country, but in the entire field of commerce here and abroad. In other words, 'whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges' ought to be considered in forming a judgment, whether such differences were or were not unjust, and the circumstance of

competition by ocean carriers at the different ports is a fact meriting consideration by the Commission in passing upon the reasonableness of an inland rate applicable from the seaboard on domestic traffic when the reasonableness of such rate is called in question by comparison with a lower rate applying from the port of entry on traffic shipped from a foreign country. Not all discriminations are unlawful, but only such as are undue or unreasonable; if based on reason and good cause, discrimination can not be condemned as unreasonable. It is well settled by the highest judicial authority that the existence and effectiveness of competition between carriers, whether by rail or water, whether subject to the Federal act of regulation or not, and competition of markets, or the absence of such competition, are among other things, pertinent to the question of similarity of circumstances and conditions involved in the ultimate question of fact under sections 3 and 4, and as to whether the discrimination complained of and shown is or is not undue or unreasonable. Since,



sion,<sup>21</sup> known as the Import Rate Case, the Commission has repeatedly recognized the right of carriers to maintain lower rates on import traffic than on domestic traffic. When the circumstances and conditions are dissimilar the imported goods may be transported under rates which are lower than the rates charged on goods of the same kind which have not been imported. The question of discrimination or whether the difference

in view of these rulings, it is the duty of the Commission in passing upon these questions to look to these and other facts, wherever found, pertaining to the traffic involved, upon the theory that the carriers may lawfully within reason meet the circumstances and conditions which confront them, it follows that we must recognize the due and logical effect of the situation thus presented. The necessary conclusion is that discriminations of the nature referred to in sections 3 and 4 of the act, in so far as they result from the *bona fide* action of a carrier in meeting circumstances and conditions not of its own creation, and which are reasonably necessary for that purpose, do not of necessity fall under the condemnation of the law. There is a long line of decisions of the court to the effect that it is neither required by law nor just that the rates of a carrier on traffic subject to intense competition shall mark the limit or measure of its rates on traffic not subject to such competition. Transportation from a seaport of the United States or an adjacent foreign country to an interior American destination in completion of a through movement of freight from a port of a foreign but not adjacent country, whether upon a joint through rate or upon a separately established,

or proportional, inland rate applicable only to imports moving through, is not a 'like service' to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination. It is true the court held in the case of *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. Rep. 822, that the existence of competition did not create 'dissimilar circumstances and conditions' such as to justify discrimination as defined in the second section. But this referred to unjust discrimination as between different shippers over the same line in the performance of a 'like service,' and as we have seen, the transportation of import traffic from the port of entry to an interior destination in completion of a through movement from a point in a foreign country is not a like service to that involved in the transportation of domestic traffic originating at such port, even where the transportation in all other respects is performed under like conditions. It follows that the charge of unjust discrimination in violation of section 2 of the act is not sustained."

21. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666.

between the import and domestic rate is unjust, is one of fact to be determined by the Commission after considering all the circumstances and conditions, including the interests of the carriers, producers, dealers and consumers.

In *Louisiana Sugar Planters' Association v. Illinois Cent. R. Co.*,<sup>22</sup> a rate of twenty-one cents on black-strap molasses from New Orleans and other Louisiana points to St. Louis was held to be unjustly discriminatory as compared with a rating of fifteen cents on imported black-strap molasses between the same points; but a difference not greater than three cents per hundred pounds was found to be proper. In another case, a third-class rating on domestic plate glass and a fourth-class rating or lower on imported plate glass, was held not to be unjustly discriminatory.<sup>23</sup> In an investigation concerning the rates governing the transportation from ports of entry to interior points in the United States of property imported from foreign countries and the relationship existing between such rates and the rates for transporting similar property originating in the United States, the Commission found that the import rates on brewers' rice from Gulf points were not made with relation to the domestic rates, but were controlled by the import rates on brewers' rice from North Atlantic ports.<sup>24</sup>

In a later case,<sup>25</sup> an adjustment of import rates on English clay from Gulf ports and North Atlantic ports to points in Central Freight Association Territory lower than the domestic rates on clay mined in the state of Georgia to the same destinations, was found not to be unjustly discriminatory against the domestic traffic.

**§ 166. Use of Terminal Facilities by Permitting Interchange of Traffic with one Carrier and Denying it to Another.** Under the Hepburn Amendment to the

22. *Louisiana Sugar Planters' Ass'n. v. Illinois Cent. R. Co.*, 21 I. C. C. 311.

23. *Pittsburg Plate Glass Co. v. Pittsburgh, C. C. & St. L. Ry. Co.*, 13 I. C. C. 87.

24. *In re Import and Domestic Rates*, 36 I. C. C. 389.

25. *In re Import and Domestic Rates on Clay*, 39 I. C. C. 132.

Interstate Commerce Act, the terms "transportation" and "railroad" subject to the control of the Commission, include all switches, tracks, terminal facilities and all services in connection with the delivery and transfer of interstate freight. The terminal facilities therefore of any railroad used in connection with the receipt and delivery of freight transported in interstate commerce are subject to the provisions of the Act.

The second clause of section 3 requires all interstate carriers to afford reasonable and equal facilities for the interchange of traffic between their respective lines. This duty is, however, subject to the limitation that no carrier is required to give the use of its tracks or terminal facilities to another carrier engaged in like business. Common carriers may be compelled to accept a car for transportation when such a car is offered at a place where the carrier has established a point of interchange, provided a reasonable compensation is fixed for the service.

A railroad company that interchanges carload freight with one connecting carrier within its switching limits and transports it over its own terminals to points of destination thereon, while denying the same service to another railroad company whose tracks connect with it, is guilty of unjust discrimination, and an order requiring it to desist from such a practice by the Commission is valid.<sup>26</sup> Such an order is not in contraven-

26. *Pennsylvania Co. v. United States*, 236 U. S. 351, 59 L. Ed. 616, 35 Sup. Ct. 370; *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696; in which the court said: "For, Section 3 requires Railroad Companies to furnish equal facilities for the interchange of traffic between their respective lines \* \* \* 'provided that this should not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.' If

the carrier, however, does not rest behind that statutory shield but chooses voluntarily to throw the Terminals open to many branches of traffic, it to that extent makes the Yard public. Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of Section 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. The carriers cannot say that the Yard is a facility open for the

tion of the statutory provision forbidding the Commission from compelling a carrier to give the use of its tracks or terminal facilities to another carrier for the reason that a requirement to interchange cars does not constitute a "use of the track or terminal facilities" of the other carrier. It is merely a service of transportation in receiving and forwarding freight to be performed on the payment of a reasonable compensation. No physical occupancy by running trains or locomotives over the terminal facilities of the other carrier is contemplated by such an order, but only the tender of freight at a point of interchange already established and where the objecting carrier receives the cars of other roads and hauls them to points of delivery over its terminals.<sup>27</sup>

switching of cotton and wheat and lumber but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso to Section 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others."

27. *Pennsylvania Co. v. United States*, 214 Fed. 445, in which Hunt, J., said: "The underlying principle is that a common carrier may be required to accept a car for transportation whenever such a car is offered at a place where the common carrier has established a point of interchange, provided always a reasonable compensation is fixed for the service. Here, the

place where the cars are offered not being an arbitrary one, the carrier Pennsylvania Company may not inquire into the ownership of the car, nor into the route over which it has been moved to reach its rails merely to decide whether or not it will transport the car so offered. To hold otherwise would greatly diminish the regulating power of the Interstate Commerce Commission to treat all carriers as within the letter of the act to regulate commerce with respect to their duties to transport. It follows that, where compensation is offered, a practice of hauling the cars of several connecting carriers and absolutely refusing to haul the cars of another carrier is a discrimination which, in the interests of the public, may be removed as properly within the power of just and reasonable regulation by the Interstate Commerce Commission. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448. The question of reasonable



**§ 167. Discrimination in Reserving Right to Route Through Shipments Beyond Carrier's Terminal—Former and Present Rule.** Prior to the amendments of 1906 and 1910, the Supreme Court, in reversing an order of the Commission,<sup>28</sup> held that an initial carrier in reserving the right of routing beyond its own terminal and in disregarding the routing instructions of the shipper beyond its own line, did not subject the shipper to any undue advantage;<sup>29</sup> but the controlling effect of this decision has been destroyed by the 1906 and 1910 amendments to section 15 of the act, which provide that the Commission may after hearing on a complaint or

compensation is in no way involved, and no opinion is passed thereon."

28. Consolidated Forwarding Co. v. Southern P. Co., 9 I. C. C. 182. See also Interstate Commerce Commission v. Southern Pac. Co., 123 Fed. 597.

29. Southern Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330. The court in this case was discussing the rights of the initial carrier under the common law and before the statutory amendment changing the common law as applied to interstate carriers. Said the Court: "It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The Commerce Act recognizes such right and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an in-

itial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads. It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier and thus end its responsibility, and charge its local rate for the transportation. If it agrees to transport beyond its own line, it may do so by such lines as it chooses. Atchison, etc. R. R. Co. v. Denver, etc. R. R. Co., 110 U. S. 667; Louisville & Nashville R. R. Co. v. West Coast Naval Stores, etc. Co., 198 U. S. 483. This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon, at least so long as they are reasonable and do not otherwise violate the law. In this case the initial carrier guarantees the through rate, but only on condition that it has the routing."

upon its own initiative without complaint establish through routes and joint rates under limitations therein prescribed.

§ 168. **Discrimination in Refusal of Rail Carriers to Establish Through Routes and Joint Rates with Water Lines.** A navigable river is a public highway, a natural avenue of commerce, and the public interest demands that its advantages be utilized to the fullest extent.<sup>30</sup> The Interstate Commerce Act gives the Commission the authority, under the 1910 and 1912 amendments, to establish through routes and joint rates not only between rail carriers subject to the Act, but also between rail carriers and water lines when property may be or is transported by common carriers from point to point in the United States by rail and water through the Panama Canal or otherwise.<sup>31</sup>

If rail carriers were permitted to choose the particular boat lines with which they associate, to establish through routes and joint rates, they would be able to dictate who shall operate on the water and who shall not, for a boat line which acquires a monopoly of the through rail and water traffic would soon be able to drive its competitors out of business. Such a policy would destroy the freedom of competition between boat lines.<sup>32</sup> While the Commission is not required to establish through routes and joint rates without regard to the circumstances of each case, when an application is made therefor, yet any responsible common carrier by water is, as a rule, entitled to participate in inter-

30. Decatur Nav. Co., v. Louisville & N. R. Co., 31 I. C. C. 281.

31. Murray, Lighterage & Transp. Co. v. Delaware & H. Co., 35 I. C. C. 388; In re application Pennsylvania Co., operation of Pennsylvania-Ontario Transp. Co., 34 I. C. C. 47; In re application Southern P. Co., operation of Pacific Mail S. S. Co., 32 I. C. C. 690; Bowling Green Business Men's Protective Ass'n, v. Evansville &

Bowling Green Packet Co., 31 I. C. C. 301; Tampa Board of Trade v. Louisville & N. R. Co., 30 I. C. C. 377; In re advances lumber, Oregon and Washington to eastern points, 29 I. C. C. 609; Truckers Transfer Co. v. Charleston & W. C. Ry. Co., 27 I. C. C. 275; Flour City Steamship Co. v. Lehigh Valley R. Co., 24 I. C. C. 179.

32. Pacific Nav. Co. v. Southern P. Co. 31 I. C. C. 472.

state traffic. A refusal to establish through routes and joint rates or fares with one steamship line while maintaining such relationship with another water carrier, has frequently been held to be unduly discriminatory and a violation of paragraph 2 of section 3 of the Act.<sup>33</sup>

**§ 169. Exclusive Privileges for Auxiliary Facilities at Stations and Terminal Grounds Lawful.** While common carriers subject to federal control must serve the traveling and shipping public on equal terms and without discriminations or preferences, they do not assume, in performing such duties, any obligations to those who are neither passengers nor shippers. In fulfilling its duties towards the public, the property of the carrier is subject to a public use, and the Commission may require and control that use to prevent discriminations and preferences towards those who travel or ship merchandise over its line.

Subject, therefore, to the requirement that the rights of the traveling and shipping public are not involved and discriminated against, the public stations, depots, grounds and terminal property of the carriers are their own private property concerning which they may contract free from public control. Hence, a carrier may make exclusive arrangements with third parties for the maintenance of facilities at stations that add to the convenience of the traveling and shipping public, before the transportation has commenced, or after it has been completed.<sup>34</sup> Were this right denied the carrier, the

33. *East Shore Development S. Co. v. Baltimore & O. R. Co.*, 32 I. C. C. 238; *Pacific Nav. Co. v. Southern P. Co.* 31 I. C. C. 472; *Decatur Nav. Co. v. Louisville & N. R. Co.* 31 I. C. C. 281.

34. *United States. Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79, 35 L. Ed. 97, 11 Sup. Ct. 490; *Express Cases*, 117 U. S. 1, 29 L. Ed. 791, 6 Sup. Ct. 542, 628; *St. Louis*

*Drayage Co. v. Louisville & N. R. Co.* 65 Fed. 39.

*Connecticut. New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159, 41 Atl. 246.

*Georgia. Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 46 L. R. A. 431, 34 S. E. 372; *Fluker v. Georgia Railroad & Banking Co.*, 81 Ga. 461, 2 L. R. A. 843, 12 Ann. St. Rep. 328, 8 S. E. 529.



granting of a permission, for instance, to one person to open a restaurant or a barber shop would operate to permit all others to enjoy the same facilities at the same station, a result palpably absurd and unreasonable.

Applying these principles, the courts have declared valid a contract whereby a transfer company was permitted by a carrier to furnish at its passenger station all vehicles necessary for the accommodation of passengers from its trains, and excluding all other hackmen and expressmen from the station and depot grounds.<sup>35</sup>

**Massachusetts.** *Old Colony R. Co. v. Tripp*, 147 Mass. 35, 9 Ann. St. Rep. 661, 17 N. E. 89.

**Minnesota.** *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 47 L. R. A. 532, 81 N. W. 835.

**New Hampshire.** *Hedding v. Gallagher*, 72 N. H. 377, 64 L. R. A. 811, 57 Atl. 225.

**Rhode Island.** *New York, N. H. & H. R. Co., v. Bork*, 23 R. I. 218, 49 Atl. 965.

**Virginia.** *Norfolk & W. R. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 50 L. R. A. 722, 37 S. E. 784.

35. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. Ed. 192, 26 Sup. Ct. 91, in which the Court said: "Applying these principles to the case before us, it would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed or obstructed in the use

either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable or arbitrary; on the contrary, it is easy to see how, in a great city and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the Transfer Company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of pass-



Similarly the Commission upheld an arrangement by which a carrier gave one auction company the exclusive

engagers was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in no wise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering company's depot as may be necessary. Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that as carriers of passengers they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owned them as hackmen no duty to aid them in their special calling. The defendants did not have or profess to

have any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the State, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee Company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passenger Station to other railway stations and to hotels or private houses in Chicago. But in a real, substantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with

right to auctioneer and sell fruits and vegetables in one of the carrier's warehouses near its freight station, it appearing that the favored company offered its services to all shippers at a uniform rate and without preference or discrimination.<sup>36</sup> Baggage transfer is either a prior or subsequent facility to the transportation duty of the carrier for the carrier's responsibility ends at the baggage room. The granting, therefore, of the exclusive privilege of soliciting on trains and issuing baggage checks to residences, by a carrier, to one baggage transfer company, does not subject a competitor to an undue advantage within the meaning of the statute.<sup>37</sup>

**§ 170. Distribution of Cars Among Shippers During Time of Shortage Must be Free from Discrimination.** The Act to Regulate Commerce authorizes the Commission to consider and determine the question of the distribution of cars in times of car shortage as a means of prohibiting unjust preferences and undue discriminations.<sup>38</sup> The statute requires that cars shall be fairly

the proper performance of its public duties and its ownership of the property in question. If the company by such use of its property also derived pecuniary profit for itself, that was a matter of no concern to the defendants and gave them no ground of complaint."

36. *Southwestern Produce Distributors v. Wabash R. Co.*, 20 I. C. C. 458. See also *Andrews Brothers v. Pennsylvania R. Co.*, 38 I. C. C. 165.

37. *Cosby v. Richmond Transfer Co.*, 23 I. C. C. 72.

38. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35

Sup. Ct. 484; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; *Pennsylvania R. Co. v. Interstate Commerce Commission*, 193 Fed. 81; *United States ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co.*, 165 Fed. 113; *Majestic Coal & Coke Co. v. Illinois Cent. R. Co.*, 162 Fed. 810; *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497; *United States v. Norfolk & W. R. Co.* 74

allotted to shippers, without preference.<sup>39</sup> The Act does not, however, define the proper method of distribution during times of car shortage, and as the question of the proper distribution is administrative in character, the Commission has the exclusive jurisdiction to pass upon the reasonableness of the rules of a carrier for car distribution.<sup>40</sup>

C. C. A. 404, 143 Fed. 266; *West Virginia Northern R. Co. v. United States*, 67 C. C. A. 220, 134 Fed. 198; *United States ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co.*, 125 Fed. 252; *Bulah Coal Co. v. Pennsylvania R. Co.*, 20 I. C. C. 52; *Jacoby & Co. v. Pennsylvania R. Co.*, 19 I. C. C. 392; *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 19 I. C. C. 356; *Rail & River Coal Co. v. Baltimore & O. R. Co.*, 14 I. C. C. 86; *Traer v. Chicago & A. R. Co.*, 13 I. C. C. 451; *Royal Coal & Coke Co. v. Southern Ry. Co.*, 13 I. C. C. 440; *Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. 398; *Thompson v. Pennsylvania R. Co.*, 10 I. C. C. 640; *Richmond Elevator Co. v. Pere Marquette R. Co.*, 10 I. C. C. 629; *Glade Coal Co. v. Baltimore & O. R. Co.*, 10 I. C. C. 226; *Parks v. Cincinnati & M. V. R. Co.*, 10 I. C. C. 47; *Hawkins v. Wheeling & L. E. R. Co.*, 9 I. C. C. 212.

39. *Pennsylvania R. Co. v. Stine-man Coal Min. Co.*, 242 U. S. 298, 61 L. Ed. 316, 37 Sup. Ct. 118; *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. 46; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 398.

40. *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; *Pennsylvania R. Co. v. Puritan*

*Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; In *Baltimore & O. R. Co. v. United States*, *supra*, the Court said: "Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the *Abilene* case, that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regulate commerce. This result is earlier illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference

In the distribution of coal cars, the commercial as well as the physical capacity of a mine should be taken into consideration; physical capacity alone is not a fair and sound basis for rating coal mines for coal distribution.<sup>41</sup> The physical capacity of a mine is determined by the thickness of the coal, the number of rooms in the mine, the capacity of the underground tracks, and the facilities for getting the coal to the surface and from the tippie at the surface into the cars. A fixed value per day is assigned to a man's labor, taking into consideration the thickness of the vein of coal upon which the work is done, and the number of places in which a man can work is taken into account, regardless of the number of men employed. Such, in substance, is the method known as the physical capacity of mines.<sup>42</sup> The commercial capacity of a mine is determined by taking the amount of shipments made by a mine during the period of free-car supply, generally from April 1st to August 1st, during the preceding two years. The physical capacity of a mine, the commercial capacity for the first year and the commercial capacity for the second year, expressed in coal tons, are then added together and the sum is divided by three. This is a method com-

would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the

record in the case of *The Interstate Commerce Commission v. Illinois Central Railroad Company*, *ante*, p. 452."

41. *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497; *Jacoby & Co. v. Pennsylvania R. Co.*, 19 I. C. C. 392; *Hillsdale Coal & Coke Co., v. Pennsylvania R. Co.*, 19 I. C. C. 356; *Rail & River Coal Co. v. Baltimore & O. R. Co.*, 14 I. C. C. 86; *Traer v. Chicago & A. R. Co.*, 13 I. C. C. 451; *Powhatan Coal & Coke Co. v. Norfolk & W. Ry. Co.*, 13 I. C. C. 69.

42. *Rail & River Coal Co. v. Baltimore & O. R. Co.*, 14 I. C. C. 86.



binning the physical and commercial capacity, which the Commission has approved.<sup>43</sup>

A rule of the Commission requiring that cars used by the carrier to haul its own coal as well as private and foreign railway fuel cars be taken into account against the distributive share of a coal company receiving them was sustained.<sup>44</sup> The Commission has not attempted to adopt exactly the same system for distribution of cars in the various coal fields of the country for each coal field on a system of railroad has its individual peculiarities, and a plan that would work with entire satisfaction on one road might and doubtless would be unsatisfactory on another road.<sup>45</sup>

In the distribution of cars for the transportation of grain during a shortage, the Commission held that the situation could not be dealt with by a fixed, arbitrary and inelastic regulation but that there should be equality in the distribution of such cars as are available, first, between shipping points, and second, between individuals at each of said points.<sup>46</sup>

The Commission has frequently decided that all cars, whether individual cars, or owned by the railroad company, or assigned by other railroad companies for fuel, should be treated as an available car equipment as a whole, distributable *pro rata* to shippers desiring their use upon a basis giving each equal facilities with the other.<sup>47</sup>

**§ 171. Preferences and Discriminations in Demurrage and Track Storage Charges.** While it is the duty of carriers to transport and deliver freight at destinations within a reasonable time, it is also the duty of

43. Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., 19 I. C. C. 356.

44. Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164.

45. In re Mine Ratings, 25 I. C. C. 286.

46. Railroad Com'rs of Iowa v. Chicago, R. I. & P. R. Co., 29 I. C. C. 396.

47. Logan Coal Co. v. Pennsylvania R. Co., 154 Fed. 497; United States ex rel. Pitcairn Coal Co. v. Baltimore & O. R. Co., 154 Fed. 108; United States v. Norfolk & W. R. Co., 74 C. C. A. 404, 143 Fed. 266; West Virginia Northern R.

the consignees to receive and accept the freight within a reasonable time after delivery. Railroad companies are able to serve the public only when their cars are used for moving freight, and they cannot properly serve the public when their tracks are not available for prompt delivery of freight.

The shipper who, at a time for demand of transportation which taxes the facilities of the carriers, occupies a track with cars beyond the free time granted, inflicts not only a loss upon the carrier but upon other shippers who desire to use the carrier's facilities. To permit one person to use the cars for storage purposes and deny that privilege to another, creates a discrimination between shippers.<sup>48</sup> Track storage and demurrage charges at congested yards are, therefore, lawful and proper.<sup>49</sup> State courts and Commissions have also approved storage charges in addition to demurrage.<sup>50</sup> Track storage charges are justified because they are necessary in order to bring about the prompt release of track space in the interest of the general shipping public at points where business is very active and the track space correspondingly limited, while car demurrage is assessed for the purpose of a proper regulation of all the car equipment of the carrier.<sup>51</sup>

Assessment of track storage charges in addition to demurrage at various yards in greater New York was

Co. v. United States, 67 C. C. A. 220, 134 Fed. 198; United States ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co., 125 Fed. 252; United States ex rel. Coffman v. Norfolk & W. Ry. Co., 109 Fed. 831.

48. In re Demurrage Charges, 25 I. C. C. 314; Kehoe & Co. v. Charleston & W. C. Ry. Co., 11 I. C. C. 166.

49. Wholesale Produce Dealers Ass'n of Brooklyn, New York v. Long Island R. Co., 26 I. C. C. 413; Murphy Bros. v. New York Cent. & H. River R. Co., 21 I. C. C. 413;

Murphy Bros. v. New York Cent. & H. River R. Co., 21 I. C. C. 176; Turnbull Co. v. Erie R. Co., 17 I. C. C. 123; Wilson Produce Co. v. Pennsylvania R. Co., 16 I. C. C. 116; New York Hay Exch. Ass'n v. Pennsylvania R. Co., 14 I. C. C. 178; Wilson Produce Co. v. Pennsylvania R. Co., 14 I. C. C. 170.

50. Miller v. Mansfield, 112 Mass. 260; Norfolk & W. R. Co. v. Adams, 90 Va. 393, 22 L. R. A. 530, 44 Am. St. Rep. 916, 18 S. E. 673.

51. Murphy Bros. v. New York Cent. & H. River R. Co., 21 I. C. C. 176.

found to be not a discrimination against that city simply because similar assessments were not imposed at other points.<sup>52</sup> The maintenance of higher demurrage charges at points in the State of California than were contemporaneously maintained in other states, was not an unjust discrimination against California.<sup>53</sup> Upon a complaint charging that the imposition of track storage charges upon certain commodities handled by produce dealers, subjected such commodities and the persons dealing therein to undue prejudice, it developed upon a hearing before the Commission that the complainants used the equipment of the carriers for warehousing purposes to sell the produce to retail dealers directly from the cars, thus avoiding double drayage. The

52. New York Hay Exch. Ass'n v. Pennsylvania R. Co. 14 I. C. C. 178.

53. In re Demurrage Charges, 25 I. C. C. 314, in which the Commission said: "In their brief protestants argued that the circumstances and conditions in California are not substantially different from those which obtain in other sections of the country where all insist the movement of the products of the section is heavy during certain portions of the year. Their principal contention, however, is that the imposition of a higher demurrage charge in California than in other states served by respondents, or than in other states of the Union, is in violation of sections 1 and 3 of the Act, and an undue discrimination against California and the shippers receivers located therein. Section 1 of the act requires that all charges for any service shall be just and reasonable. The record in this case, we think conclusively shows that under the circumstances a demurrage charge of

\$3 per car per day on interstate shipments in California is not unreasonable *per se*. Section 3 of the Act prohibits undue or unreasonable preferences or advantage to any person, locality, or particular kind of traffic. Section 2 of the Act prohibits charging to one a greater or less compensation than is charged to another for a like and contemporaneous service under substantially similar circumstances and conditions. If it can be said that Section 3 prohibits a higher demurrage charge in California than is assessed in New York, would it not necessarily follow that it also prohibits charging a higher rate for transporting a given quantity of freight a given distance in California than is charged for a like service in New York? Clearly the circumstances and conditions connected with the service rendered must be taken into consideration in determining what is undue or unreasonable preference or charge under Section 3 of the Act."

Commission held that under the circumstances, the charges were justified.<sup>54</sup>

**§ 172. Unreasonable Compensation to Shippers for Services in Connection with Transportation.** The Act provides that if any owner of property transported renders any service connected with such transportation, or furnishes any instrumentality used therein, the carrier may compensate the shipper for the service rendered or the instrumentality furnished in connection with his own shipments. If the amount is reasonable, it is not a prohibited rebate or discrimination even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefore.<sup>55</sup> But when a carrier employs a shipper to perform a service which is a part of the transportation, the shipper obtains an unreasonable preference and advantage in violation of the statute if the compensation therefor is excessive.<sup>56</sup>

54. *Wholesale Produce Dealers Ass'n of Brooklyn, New York v. Long Island R. Co.*, 26 I. C. C. 413.

55. *United States v. Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75 *Knapp v. Minneapolis, St. P. & S. S. M. R. Co.*, 33 N. D. 291, 156 N. W. 1019.

56. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 38 I. C. C. 40, in which the Commission said: "The service over private tracks from the lines and coke ovens of shippers to the rails of the carrier is not now nor was it during the period of the action either compelled or prohibited by the statute or by the common law. To furnish it or to withhold it is within the discretion of the defendant; but whatever course is pursued, the statutory inhibition of unjust discrimination and unreasonable preference or advantage must be

observed. In the exercise of this right the defendant elected to furnish the service and therefore its admitted undertaking, so found by the Supreme Court of the United States, was found to transport the product of the shippers from their lines and coke ovens at the rate published in its tariffs. If all the shippers of coal and coke were furnished the same character of service and also were required to pay the published tariff rates therefor, the undertaking in itself would not be discriminatory, nor would it result in unreasonable preferences or advantage. In order, however, to overcome physical disabilities, such as unusual grades, light rail, and abnormal curvatures the defendant employed some of the shippers to perform a part of its undertaking by hauling their products over their lines and coke



**§ 173. Abnormal Division of Joint Rates to Carrier Unlawful.** A railroad company as a shipper is entitled to the same rights and is subject to the same liabilities as a commercial shipper even when the shipment moves in part over the rails of such railroad company. It may, therefore, participate in the division of a joint through rate when shipping its own property; but it is unlawful for a carrier to make special and discriminatory divisions of joint rates as between an original or participating carrier and the purchasing carrier.

The fundamental purpose of the statute was to stamp out all discriminations and concessions and to place all shippers on an equality. If, therefore, one carrier in the transportation of its own fuel has paid a special and abnormal division of a joint rate, such a method is the means of indirectly reducing transportation charges and producing undue discriminations. If the division of such a joint rate is such as to amount to a rebate or discrimination in favor of one carrier as a shipper, the Commission has the power to inquire into the unreasonableness of the division and to reduce the amount to the carrier-shipper.<sup>57</sup>

**§ 174. Undue Discriminations in Divisions of Joint Through Rates to Tap Lines or Logging Roads.** Ordinarily the law has no concern with the division of joint

ovens to its rails, paying to them for this service varying allowances. Even this practice by itself would not be discriminatory, nor would it result in unreasonable preferences or advantages if the allowances to all shippers who perform the service were no more than sufficient to compensate them for its cost, including a reasonable profit of the same percentage to all shippers. If, however, the allowances included appreciable profits of unequal percentages, the shippers receiving the greater percentage of profit were given unreasonable preferences and advantages over competing shippers

who received no such allowances because the defendant carrier, instead of this, either did or was ready and willing to perform the service."

57. Tap Line Cases, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; Interstate Commerce Commission v. Baltimore & O. R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. 742, Ann. Cas. 1914A 504; In re Rates on Railroad Coal and Other Fuel, 36 I. C. C. 1; Manufacturers' Ry. Co. v. St. Louis I. M. & S. Ry. Co., 28 I. C. C. 93; In re Company Material, 22 I. C. C. 439; In re Division of Joint Rates, 22 I. C. C. 51.

rates which carriers make by agreement. They have the right to make such divisions of their joint rates as they see fit, and to raise or lower their divisions at will. But this principle has decided limitations. If the division is such that a rebate or a discrimination of an undue advantage to a shipper results, the Commission has jurisdiction over the divisions and may reduce the amount which one carrier receives.<sup>58</sup> In the Tap Line Cases,<sup>59</sup> the Supreme Court, in overruling an order of the Commission,<sup>60</sup> held that certain logging roads in Louisiana, Arkansas and Texas were not merely facilities of lumber mills but were common carriers within the meaning of the Act, and as such were entitled to participate in joint rates with other common carriers, although most of the property transported consisted of lumber of the mill owners. The court, however, distinctly recognized and ruled that the divisions of such joint rates between the owners of the tap lines and the carriers were under the control of the Commission and that an unjust discrimination therein might be forbidden.

Following this decision, the Commission investigated the allowances made to certain tap lines and logging roads and the divisions of the joint rates were affected and a proper amount to the tap line owners was determined upon. The Commission found that the division of the joint rates allowed to the tap lines amounted to rebates or discriminations in favor of the owners of the tap lines who were also shippers because of the disproportionate amount allowed in view of the services rendered.<sup>61</sup>

58. Tap Line Case, 31 I. C. C. 490; *In re Galveston Wharf Charges*, 23 I. C. C. 535.

59. *United States v. Butler County R. Co.*, 234 U. S. 29, 58 L. Ed. 1196, 34 Sup. Ct. 748; *Tap Line Case*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

60. *Tap Line Case*, 23 I. C. C. 277; *Kaul Lumber Co. v. Central of Georgia Ry. Co.*, 20 I. C. C. 450;

*Fathauer Co. v. St. Louis, I. M. & S. Ry. Co.*, 18 I. C. C. 517; *Star Grain & Lumber Co., v. Atchinson, T. & S. F. Ry. Co.*, 17 I. C. C. 338, 14 I. C. C. 364; *Central Yellow Pine Ass'n v. Illinois Cent. R. Co.*, 10 I. C. C. 505; *Central Yellow Pine Ass'n v. Vicksburg, S. & P. R. Co.*, 10 I. C. C. 193.

61. *Tap Line Case*, 31 I. C. C. 490.

§ 175. **Grant of Wharfage Privileges to One Shipper Denied to Others Unlawful.** Common carriers under federal control are required to accord to all shippers who are entitled to like treatment, equal rights both in the receiving of supplies and the shipment of their products, and a carrier who, under any pretext whatsoever, grants to one shipper an advantage which he denies to another, violates the spirit and thwarts the purpose of the statute.<sup>62</sup>

A contract or lease, therefore, by which a terminal company gave to an exporter of cotton seed products a portion of its wharf without the payment of wharfage storage charges while denying the same privileges to other exporters, constituted an undue preference within the meaning of the law, although the exporter paid a yearly rental for the use of the pier and the improvements thereon.<sup>63</sup>

62. *Castle v. Baltimore & O. R. Co.*, 8 I. C. C. 333.

63. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279. "It is next contended," said Mr. Justice McKenna, "that the lease to Young under the facts proven does not constitute an unlawful or undue preference under the Interstate Commerce Act. To a certain extent we have considered this contention. An absolute advantage to Young cannot be denied. A facility that has enabled him to acquire practically all the export of cotton seed products must have something in it of advantage which other shippers do not receive, and it would seem to proclaim a power working for his benefit which is not working for others. And yet it is urged that there is a contrariety of opinion about it among cotton seed cake producers and as to whether Young is able to dominate the Texas market and to command the for-

eign trade. The facts, we think, put the matter beyond conjecture or opinion and demonstrate the potency of his situation. That it is a preference, however, is denied; since it is urged that by the agreed statement of facts all cotton seed cake producers 'agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired' by Young, 'it would be of great benefit to the cotton seed industry.' But it is also agreed that neither the Galveston Wharf Company nor the Terminal Company has space enough to afford facilities to 'all exporters doing business at Galveston' such as Young. And the Commission found that as a practical matter other shippers could not be given the same facilities on the same conditions as those granted to him, nor could such facilities be secured on the bay front. It was further found that the Terminal Company had indicated that it is not willing to accord shippers gen-



Similarly, the practice of a railroad company at its wharves in refusing to deliver at ship-side to vessels other than those belonging to or consigned to a transit company, a corporation owned by and the agent of the railroad company, or to receive at ship-side from such vessels property transported or to be transported in commerce subject to the Interstate Commerce Act, while delivering like property at ship-side to, and receiving like property at ship-side from vessels consigned to or belonging to the said transit company, was held to be unduly discriminatory and unlawful.<sup>64</sup>

In another case it was held by the Commission that a carrier was guilty of undue preference when it denied the use of its wharf and docks to some shippers while permitting such use to favored steamship lines, for when a railroad has a wharf at which its tariffs offer delivery, and at which part of the shipping public is served, but to which it does not give all access, it must make delivery at the same rate at some other wharf in the same terminal.<sup>65</sup>

erally such facilities, and that the situation of its docks with respect to space is such that it cannot be so even if it were willing. It may be contended that the patrons of a railroad are obliged to seek or compete for extraordinary facilities in its terminals. But, be that as it may, all shippers must be treated alike."

64. *In re Wharfage Facilities at Pensacola, Florida*, 27 I. C. C. 252.

65. *Mobile Chamber of Commerce v. Mobile & O. R. Co.*, 23 I. C. C. 417. "We do not regard the Mobile docks," said Commissioner Lane, "of the defendants in any other light than as public terminals. These carriers make their rates to apply from point of origin to the ships side at these docks. The necessary implication arising from these facts is that access must be given to these wharves by

whatever ship the shipper chooses to have his freight carried from the wharf so long as such access may be safely and properly given. A railroad may not have a preferred line of steamships to the exclusion of other ships. Without doubt it may prefer one line and have more intimate relationship with such line than with others, but its duty as a common carrier by rail cannot be neglected because of such arrangements. It may set aside one or more docks for the use of such allied lines so long as such practice does not conflict with its duty to give delivery at these docks to whomever may apply for the freight properly deliverable to that point. If it chooses to give up its entire dock facilities to some particular line, it may do so, but it must make delivery upon equal terms to other ships at that port,



**§ 176. Unlawful Discriminations and Preferences in Transit Privileges.** A transit privilege is one where the carrier transports a commodity to a milling or manufacturing point where a commercial process is performed and the resulting product is moved on to other destinations at the through rate.<sup>66</sup> Prior to the amendment of 1906, the extent of the authority of the Interstate Commerce Commission in regulating transit

if it has undertaken to deliver the freight it transports at the ship's side. As recently stated in *Baker-Whiteley Coal Co. v. Baltimore & O. R. R. Co.*, 188 Fed. 412 'That a railroad company has the right to keep a pier for its own use and for the use of such transportation lines as have contracts with it for transshipment, cannot be denied, provided it offers to the public reasonable facilities elsewhere at equal rates for the receipt of coal shipped from its road to Baltimore to be there transshipped.' In other words, a railroad has certain primary duties which it must discharge to the shipping public before it is free to exclude this public from any of the facilities which it uses or controls in the performance of its public duties. It need not make a rate to ship-side unless its lines extend there; but, making such rate, and having such facilities, it must give the shipper access to the terminal to receive the traffic; and it may no more discriminate as between shippers at a wharf than it may lawfully discriminate as between trucks at a freight shed."

66. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 Sup. Ct. 363; *United States v. Louisville & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113; *Lewis, Leonhardt & Co. v. Southern R. Co.*, 133 C. C. A.

237, 217 Fed. 321; *Nichols & Cox Lumber Co. v. United States*, 129 C. C. A. 124, 212 Fed. 588; *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577; *In re Advances Grain, Lawrenceburg, Ind.*, 35 I. C. C. 27; *Spiegle & Co. v. Southern Ry. Co.*, 34 I. C. C. 448; *In re Advances Transit Rates on Logs and Staves at Alexandria, La.* 34 I. C. C. 169; *Mixed Car Dealers' Ass'n v. Delaware, L. & W. R. Co.*, 33 I. C. C. 133; *Middletown Car Co. v. Pennsylvania R. Co.*, 32 I. C. C. 185; *National Casket Co. v. Southern Ry. Co.*, 31 I. C. C. 678; *Empire Coke Co. v. Buffalo & S. R. Co.*, 31 I. C. C. 573; *Stock & Sons v. Lake Shore & M. S. Ry. Co.*, 31 I. C. C. 150; *Newark Grain Co. v. Southern P. Co.*, 30 I. C. C. 431; *Gadow v. Chicago, St. P., M. & O. Ry. Co.*, 29 I. C. C. 457; *Wichita Board of Trade v. Abilene & S. Ry. Co.*, 29 I. C. C. 376; *In re Advances Fabrication-in-transit Charges*, 29 I. C. C. 70; *Clinton Sugar Refining Co. v. Chicago & N. W. Ry. Co.*, 28 I. C. C. 364; *Memphis Freight Bureau v. Illinois Cent. R. Co.*, 27 I. C. C. 1; *Spiegle & Co. v. Southern R. Co.*, 25 I. C. C. 71; *Transit Case*, 24 I. C. C., 340, 26 I. C. C. 204, 25 I. C. C. 130; *In re Wool, Hide & Pelt Rates*, 23 I. C. C. 151; *In re Substitution of Tonnage*, 18 I. C. C. 280.

privileges was doubtful, but under the Hepburn amendment of that date, the reasonableness or discriminatory effect of transit privileges, and all rules and regulations in connection therewith, are now subject to the jurisdiction of the Commission. In the exercise of its authority, rules and regulations susceptible of discriminatory or other unlawful application, may be condemned by the Commission.<sup>67</sup>

The transit privilege is applied to the movement of many commodities. Generally, in its application, the raw material pays the local rate into the point of manufacture. When the manufactured product afterwards goes forward, it is transported upon a rate which would be applied to that product had it originated in its manufactured state at the point where the raw material was received for transportation.<sup>68</sup> The essential object of transit privileges is to enable shippers to employ a method of transit which, but for the privilege, would subject material to local rates instead of entitling it to an ultimate through rate. The through rate is applied later upon the theory and the condition that stoppage at the transit point was for some legitimate treatment of material, and that the continuation of the transit desired, is of the same material, its product or equivalent, to a through rate destination.<sup>69</sup>

Under a transit privilege a shipper may, therefore, receive the benefit of a through rate from the point of origin of the commodity to the final point of destination instead of being required to pay the rate to the milling or merchandizing point, plus the rate from such point, the sum of such rates being generally in excess of the through rate from the first point of origin to the point of final destination.<sup>70</sup> When rates are changed

67. Transit Case, 26 I. C. C. 204, 25 I. C. C. 130, 24 I. C. C. 340.

68. Central Yellow Pine Ass'n v. Vicksburg, S. & P. R. Co., 10 I. C. C. 193.

69. Nichols & Cox Lumber Co. v. United States, 129 C. C. A. 124,

212 Fed. 588; Grand Rapids & I. R. Co. v. United States, 129 C. C. A. 113, 212 Fed. 577; Lewis, Leonhardt & Co. v. Southern R. Co., 133 C. C. A. 237, 217 Fed. 321.

70. In re Milling in Transit, 17 I. C. C. 113.

while the commodity is in a state of suspended transportation at the transit point, the rate in effect on the date of the first movement of the shipment from the point of origin should be applied.<sup>71</sup> If a transit privilege is applied without discrimination, it results in the diffusion of business by giving rival communities the relative advantage to which they are entitled and which can legally be given them in no other way.<sup>72</sup>

It is clearly discriminatory for a carrier to single out one product of grain for example, and withhold a transit privilege from it while granting the same privilege at the same place or at some other competitive point, to other products of grain of substantially similar character, value and packing, and which is transported under substantially similar conditions.<sup>73</sup> But a carrier may withhold a transit privilege from a product that is essentially different from the raw material and from other products of the same raw material which are accorded transit rates. For example, the Commission held that cornstarch did not constitute a like kind of traffic with cornmeal and cornflour, and a denial of the privilege of milling corn into starch under a transit rate did not constitute an unjust discrimination even when the right was given to other industries to mill corn into other uncooked corn products.<sup>74</sup>

Substitution at the transit point of one commodity for another and the transportation of the substituted commodity at the transit rate is illegal.<sup>75</sup> Thus, common carriers were found guilty of giving rebates through the device of unlawful substituting lumber at the transit point.<sup>76</sup> The rules and regulations of the Southern Railroad Company applicable to transit on lumber to points on its system were found not to be unduly dis-

71. *In re Milling in Transit*, 17 I. C. C. 113.

72. *In re Wool, Hide & Pelt Rates*, 23 I. C. C. 151.

73. *Douglas & Co. v. Chicago, R. I. & P. Ry. Co.*, 21 I. C. C. 541, 21 I. C. C. 97, 16 I. C. C. 232.

74. *Douglas & Co. v. Illinois Cent. R. Co.*, 31 I. C. C. 587.

75. *In re Substitution of Tonnage*, 18 I. C. C. 280.

76. *Nichols & Cox Lumber Co. v. United States*, 129 C. C. A. 124, 212 Fed. 588; *Grand Rapids & I. R. Co. v. United States*, 129 C. C. A. 113, 212 Fed. 577.

criminatory but a refusal to apply the transit rate on small shipments of lumber of a particular kind was held to be unreasonable.<sup>77</sup>

§ 177. **Compensation for Transit Privileges Not Limited to Actual Cost.** The stopping of a commodity in transit for the purpose of treatment or reconsignment is one of some benefit to a shipper and involves some service by and expense to the carrier. In an early case the Commission held that carriers violated the statute prohibiting undue preference by charging for the privilege more than what it actually cost them to perform the service incident thereto.<sup>78</sup> But on writ of error to the Court of Appeals, the Supreme Court held that the carriers were entitled to compensation in addition to the actual cost.<sup>79</sup> "A carrier," said the Court "may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the transportation, but outside thereof. Whether the conclusion of the commission that the carrier is under no obligations to permit the interruption of the transit is right, and whether it is or is not under such obligation, it is entitled to receive some compensation beyond the mere cost for that which it does. We have been particular to copy the exact language used by the commission, for in another case between the same plaintiff and other railroad companies, involving the charges in a case of reconsignment of hay, decided on December 20 of the same year (*St. Louis Hay & Grain Company v. The Illinois Central Railroad Company et al*, 11 I. C. C. 486), the commission made an order dismissing the complaint. It is true that the

77. *National Casket Co. v. Southern Ry. Co.*, 31 I. C. C. 678.

78. *St. Louis Hay & Grain Co. v. Mobile & O. R. Co.*, 11 I. C. C. 90; See also *Southern R. Co. v.*

*St. Louis Hay & Grain Co.*, 82 C. A. 614, 153 Fed. 728.

79. *Southern R. Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 53 L. Ed. 1004, 29 Sup. Ct. 678.



facts are not precisely like those in this case, but at the same time the difference in the conclusions of the commission is such as seems to suggest that perhaps on further examination the commission had come to a different conclusion."

**§ 178. Extension of Transit Privilege Over Twelve Months Unreasonable—Exceptions Permitted.** A transit privilege extending through a period of over twelve months is *prima facie* unreasonable, but as applied to the creosoting of lumber, a period of eighteen months is not unreasonably long, provided the full local rates on the inbound material are required to be paid.<sup>80</sup> Tariff rules of carriers limiting to eighteen months the time within which cross ties, creosoted in transit, might be reshipped at the through rates from points of origin to final destination, the Commission held, were not discriminatory or unreasonable.<sup>81</sup>

**§ 179. Carriers May Allow Compensation to One Shipper for Transportation Services and Deny Same Privilege to Another.** When a carrier employs several shippers to perform a part of its undertaking and pays them varying allowances, this practice is not discriminatory when the allowances to all of them are no more than sufficient to compensate for the cost, including a reasonable profit of the same percentage to all shippers. If, however, the allowances include appreciable profits of unequal percentage, the shippers receiving the greater percentage of profits are given unreasonable advantages and preferences over competing shippers.<sup>82</sup>

**§ 180. Contracts Requiring Expedited Services Not Open to All Shippers Invalid.** The broad purpose of Congress in the enactment of sections 2 and 3 was to compel the assessment of reasonable rates and their uniform application. A special contract, therefore, with one shipper whereby the carrier agreed to expedite the transportation of horses by guaranteeing a particular

80. Conference Ruling No. 232. Co., 42 I. C. C. 35.

81. National Lumber and Creosoting Co. v. Texas & Ft. S. Ry.

82. Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 38 I. C. C. 40.

connection and a carriage on a particular train at the usual published rates, was void in that the shipper was given a preference and an advantage not open to all shippers at the same rate. The purpose of the Interstate Commerce Act would be defeated if sanction were given to such special contracts.<sup>83</sup> In the case cited, the United States Supreme Court reversed a judgment obtained in a state court on a contract under which the shipper claimed the carrier agreed to transport his horses from a point in Illinois to New York on a certain special train.

**§ 181. Preferential Rates to Other Carriers as Shippers Prohibited.** It is unlawful to apply one rule when a shipment is for a railroad and a different rule for a private individual, if the traffic is like in kind and the circumstances and conditions of transportation are substantially similar. There is no warrant either in the common law or under the statute for the theory that a carrier as a shipper over the lines of another carrier may enjoy or be given a preferred status.<sup>84</sup> Such a practice cannot be upheld without resulting in unjust discriminations which it was the purpose of Congress to abolish and prohibit. But a railroad company, on the other hand, as a shipper or consignee, is entitled to the same consideration as any commercial shipper or consignee even when the shipment moves partly over its own lines. It, therefore, follows that, in such cases, the carrier as a shipper is entitled to a division of a joint through

83. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501.

84. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403; *Pennsylvania R. Co. v. International Coal Min. Co.*, 97 C. A. 383, 173 Fed. 1; *In re Rates, Divisions, Rules, etc.*, 36 I. C. C. 1; *Doran v. Nashville, C. & St. L. Ry. Co.*, 33 I. C. C. 523; *Crescent Coal & Mining Co. v. Balti-*

*more & O. R. Co.*, 23 I. C. C. 181; *In re Company Material*, 22 I. C. C. 439; *In re Restricted Rates*, 20 I. C. C. 426; *Hitchman Coal & Coke Co. v. Baltimore & O. R. Co.*, 16 I. C. C. 512, 17 I. C. C. 473; *In re Contracts of Express Companies*, 16 I. C. C. 246; *In re Railroad-Telegraph Contracts*, 12 I. C. C. 10; *Capital City Gas Co. v. Central V. R. Co.*, 11 I. C. C. 104.

rate; but that division, to avoid discrimination, must be fixed by the same considerations which would determine the division upon through commercial shipments in which the carrier has no interest as a shipper.<sup>85</sup>

### § 182. Foregoing Rules Illustrated and Applied.

The Supreme Court, for example, in reversing a decision of the Commerce Court, and in affirming an order of the Interstate Commerce Commission, held that the services performed by a carrier in connection with the transportation of coal to be used for fuel by railroads as compared with the services performed by them in connection with the transportation of other coal including "commercial" coal, were alike and were performed under substantially similar conditions and circumstances.<sup>86</sup> In

85. *In re Rates, Division, Rules, etc.*, 36 I. C. C. 1; *In re Company Material*, 22 I. C. C. 439.

86. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 225 U. S. 326, 56 L. Ed. 1107, 32 Sup. Ct. 742, Ann. Cas. 1914A 504. Said the Court: "The circumstances and conditions which may so far be considered as distinguishing traffics so as to take from different transportation charges the vice of preference have been described by this court. In *Wight v. United States*, 167 U. S. 512, 518, it is said: 'It was the purpose of the section (2) to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.' These words are given more precision by the declaration that the phrase, 'under substantially similar circumstances and conditions,' as found in section 2, refers to matters of carriage, and does not include competition. And

this was repeated in *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 161, 166. The facts in both cases give significance to the rulings. In the first case the charges to the shippers were the same, but one was given extra facilities; in the second case the extraneous effect of competition was excluded as an element in the application of the section. There is also example in *Interstate Commerce Commission v. Delaware, L. & W. R. R. Co.*, 220 U. S. 235. It was there held that a carrier could not look beyond goods tendered to it for transportation in carload lot 'to the ownership of the shipment' as the basis for determining the application of its established rates. Do the circumstances and conditions in this case give a greater power of discrimination and justify the lower charge to railroad-fuel coal? It is admitted that the fact that a railroad is the shipper or consumer is not a circumstance or condition that affects the carriage, nor can the different uses to which the coal may be put, and it

Capital City Gas Co., v. Central V. Ry. Co., cited *supra*, the Commission also held that the maintenance of a rate on coal when intended for "railroad supplies" and maintenance at the same time of a higher rate between the same points on coal used for other purposes constituted unlawful discrimination.

In another case<sup>87</sup> the Commission held that a railroad company might lawfully transport men and supplies of an express company without reference to any tariffs when they are employed or used in the business of the express company upon the line of that railway, but that the railroad company might not lawfully transport men and supplies of the express company when they were employed or used in the business of the express company at points not on the line of that railroad. In *Hitchman Coal & Coke Co. v. Baltimore & O. R. Co.*, cited *supra*, it appeared that the defendant charged rates on coal from a certain district to Cleveland, Ohio, of one dollar per ton when for commercial purposes, ninety-eight cents per ton when for vessel fuel, eighty-eight cents when for fuel cargo and sixty-five cents per ton when for railroad purposes. The Commission held there was no intimation in the Act to Regulate Commerce that a carrier as a shipper might be given a status different from or more advantageous than that given to all other shippers. Similarly, in *Pennsylvania R. Co. v. International Coal Min. Co.*, cited *supra*, the Court affirmed the judgment of the lower court awarding damages because the plaintiff had been charged the higher

would seem necessarily that any other extraneous condition or circumstance could have no greater potency. Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before, or their attitude and

interest after, transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but the relation of a railroad to its patrons, who are entitled to equality of charges. See *Pennsylvania R. R. Co. v. International Mining Co.*, 173 Fed. Rep. 1."

87. In re Contracts of Express Companies, 16 I. C. C. 246



rate on so-called "free coal" than others had been charged on so-called "contract coal." The Court said: "The law having in view the carriage of freight and equal rates to all, it is clear to us that the words 'substantially similar circumstances and conditions' as used in this sub-section, are those which affect transportation, and not those which involve personal conditions or contractual relations between one particular shipper and the carrier, but are such things only as are circumstances of carriage generally."

But a carrier has the right to transport the employes and materials of a contractor building an extension to its line either free or at reduced rates without being guilty of unjust discrimination. In transporting such character of traffic over its own road, in connection with the extension or improvement of its own line, the railroad company is not acting in the performance of its duty as a common carrier. Such agreements with contractors for free transportation are outside of the policy of the law prohibiting departures from published tariffs.<sup>88</sup>

**§ 183. Storage Regulations Must Be Enforced Without Preference or Discrimination.** Any variation from the established and commonly enforced rules of a carrier for the prompt removal of goods from freight depots, or for the loading and unloading of cars on railway tracks or private sidings, constitutes an obvious advantage to the shipper or consignee favored.<sup>89</sup> The public interests therefore require that freight should be removed promptly from the carrier's premises, and storage regulations should be observed and enforced without discrimination.<sup>90</sup> Thus, a rule limiting free storage

88. *Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co.*, 228 U. S. 177, 57 L. Ed. 787, 33 Sup. Ct. 474.

89. *American Warehousemen's Ass'n v. Illinois C. R. R.*, 7 I. C. C. 556.

90. *Commercial Exchange of Philadelphia v. Ry.* 38 I. C. C. 320; *Brey v. Pennsylvania R. R.*, 16 I. C. C. 497; *New York Hay Exchange Ass'n v. Pennsylvania R. R.*, 14 I. C. C. 178; *Wilson Produce Co. v. Pennsylvania R. R.*, 14 I. C. C. 170.

time at Philadelphia to two days was held not to be unjustly discriminatory.<sup>91</sup>

§ 184. **Haulage by Stage or Wagon from Destination Points not a Dissimilar Circumstance Justifying Lower Rates.** In charging higher rates for the transportation of freight of a like kind to certain destinations for consumption there, than for freight to be forwarded by wagon to other points from the same terminus, carriers are guilty of unjust discrimination, for the fact that goods after delivery by the carrier are hauled beyond that point in wagons to other towns, does not constitute a dissimilar circumstance in the transportation. Thus, an arrangement by which carriers between St. Louis and Eureka Springs, Ark., charged less for goods forwarded by wagon from Eureka Springs, Ark., to Harrison and other towns in Arkansas, than for the same kind of freight from St. Louis to merchants at Eureka Springs, was condemned by the Commission.<sup>92</sup>

The same principle was applied by the Commission in another case in which it was held that a common carrier may not lawfully make rates to a given point on its line on traffic going beyond by wagon or similar conveyances which are lower than its established rates to that point as a final destination.<sup>93</sup> An arrangement of a carrier through which passenger fares to Gardner, Montana and return, were lower than for those who went beyond that point by stage to Mammoth Hot Springs or through Yellow Stone National Park, constituted an unjust discrimination, for a carrier has no right to make one rate for passengers whose journey ends at its terminus and a lower rate for passengers who travel beyond that point by stage.<sup>94</sup>

§ 185. **Preparing Cars for Shipment of Commodities for Some Shippers and Refusing Same Service to Others.** Where special preparation is required to fit a

91. *Commercial Exchange of Philadelphia v. Ry.*, 38 I. C. C. 320.

92. *Cary v. Eureka Springs Ry.*, 7 I. C. C. 286.

93. *Bayou City Rice Mills v. Texas & N. O. R. R.*, 18 I. C. C. 490.

94. *Wylie v. Northern P. Ry.*, 11 I. C. C. 145.

car for the shipment of a particular commodity, the task should ordinarily be performed by the shipper,<sup>95</sup> unless it is a part of the transportation facilities defined in the first section of the Act and which it is the duty of a carrier to provide.<sup>96</sup> For, in cases of carload freight, where the loading is done by the shipper, he can ordinarily perform the work more economically than the carrier.

But allowances to one shipper for the work of preparing the car for a shipment while declining a similar payment to another, or to pay at one place while refusing to pay at another, unless justifying circumstances and conditions are shown, creates an undue discrimination. For example, the Missouri Pacific Railway Company made allowances for lining and padding cars preparatory for flour shipments within switching limits in St. Louis and refused the same privilege elsewhere. The practice was condemned by the Commission.<sup>97</sup>

**§ 186. Grain Elevator Service Must be Open to All Shippers Without Preference.** There are two kinds of elevator service in connection with grain, one called transportation elevation and the other commercial elevation. The former consists in the passing of the grain through an elevator for the purpose of transferring it from car to car and obtaining its weight and is usually limited to ten days free storage in the elevator. This is a part of the transportation which the carrier may be required to perform under the amendment of 1906.<sup>98</sup> Commercial elevation involves various processes in the treatment of the grain itself such as mixing, cleaning,

95. *In re Advances Dunnage Allowances*, 30 I. C. C. 539; *New York State Shippers Protective Ass'n v. New York Cent. & H River R. Co.*, 30 I. C. C. 437; *Southwestern Missouri Millers' Club v. St. Louis & S. F. R. Co.*, 26 I. C. C. 245; *Davies v. Louisville & N. R. Co.*, 18 I. C. C. 540; *National Wholesale Lumber Dealers' Ass'n v. Atlantic Coast Line R. Co.*, 14 I. C. C. 154.

96. *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291.

97. *Southwestern Missouri Millers' Club v. St. Louis & S. F. R. Co.*, 26 I. C. C. 245.

98. *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22.

clipping, drying, etc., and is not a part of the duty of the carrier.<sup>99</sup> As the carriers are required to furnish what is termed transportation elevation as distinguished from commercial elevation, they are not required to do so at their own expense.

The service must however be open to all on equal and reasonable terms. Proper arrangements must be made for furnishing elevation for all shippers, for otherwise the carrier would subject itself to the charge of practicing an unlawful discrimination.<sup>1</sup> Having the right and imposed with the duty of furnishing elevation, the carrier has the right to operate its own elevator or may make arrangements with the owner of an elevator for such service.<sup>2</sup>

**§ 187. Allowances When Owner of Elevator is Shipper of Grain—Former and Present Rule.** Allowances by a carrier to an owner of an elevator who was also a shipper of a part of the grain passing through his elevator, were originally condemned by the Interstate Commerce Commission for the reason that under such circumstances, a person who was both a shipper of grain and the owner of an elevator enjoyed advantages not open to all others in that he was enabled thereby to mix, treat, weigh, clean and inspect his grain in his own elevator. It was held that the allowance *pro tanto* was a contribution by the carrier to the owner for the cost of securing these commercial benefits, and that it resulted in an undue preference when paid on grain belonging to the owner, unless confined to grain re-shipped in ten days and not mixed, treated, weighed and inspected.<sup>3</sup> But the Supreme Court, when the order of the Commission in the cases cited came before it, held that allowances to owners of elevators who were also shippers of grain for elevation services were legal,

99. *In re Elevator Allowances*, 24 I. C. C. 197.

1. *In re Elevator Allowances by Union Pacific*, 12 I. C. C. 85.

2. *In re Elevator Allowances by Union Pacific*, 14 I. C. C. 315.

3. *Traffic Bureau of St. Louis v. Chicago, B. & Q. R. Co.*, 14 I. C. C. 317; *In re Elevator Allowances by Union Pacific*, 14 I. C. C. 315.



although the shippers during the process derived an advantage by commercially treating the grain while in the elevator.

The court further held that the allowance should not be limited to the actual cost of the elevation but that the owner was entitled to reasonable compensation for the services rendered.<sup>4</sup> "The ground on which the payment to owners of grain finally was held (by the Commission) to be a rebate," said the Court, "had been considered from the beginning and, as we have said, had been brought to the mind of Congress. It is that when the owners of the elevators own the grain put into them they have the opportunity to perform other services to the grain in the way of treatment, or cleaning, clipping, and mixing the grain, which although not included under the term elevation or paid for by the railroad, it is an advantage to them to be able to perform at the same time. This advantage is thought to create an undue preference and unjust discrimination. \* \* \*

On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in Sec. 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, Sec. 12, 36 Stat. 539,551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

**§ 188. Allowances for Lighterage Services to Shipper Within Free Delivery Zone not Discriminatory as to Shippers Beyond Zone.** Carriers are frequently compelled by geographical and physical conditions to estab-

4. Interstate Commerce Commission v. Duffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22.

lish limits within which they deliver traffic without additional charges; for the establishment of free delivery districts is a matter within the business discretion of the carrier. They may, therefore, pay a just and reasonable compensation to a shipper for lightering traffic within such zones to their terminals and refuse to pay shippers outside of the free delivery zone to the same terminal without being guilty of any unjust discrimination under the statute.<sup>5</sup>

This principle was established by the national Supreme Court after an extended litigation commencing before the Commission in 1908 and ending with the final decision of the Court in 1913.<sup>6</sup> In this case it appeared that the defendant railroad companies were interstate trunk lines whose freight rail terminals were at the New Jersey shore of the harbor of New York. Transportation of freight into and out of the city of New York was conducted by means of car floats, barges and steam lighters operating between the city and the New Jersey shore. To meet these conditions the carriers with freight terminals on the New Jersey side of the harbor had for many years established a free lighterage service to and from a defined area along the river front in New York City, the rate into or out of such points being the same as that applicable to the New Jersey rail terminals. Within these free zones on the New York side the carriers maintained public freight terminal stations at which they delivered eastbound freight and accepted west-bound freight. Some of these stations were owned solely by one carrier; others were joint depots and some were operated by third persons who managed and operated them under contracts and as agents for the carriers. One of the latter stations was owned and operated by Arbuckle Brothers to whom the carriers agreed to pay an allowance for maintaining the station and also for lightering all freight therefrom to the railroad terminals

5. Federal Sugar Refining Co. v. & O. R., 231 U. S. 274, 58 L. Ed. Baltimore & O. R. Co., 20 I. C. C. 218, 34 Sup. Ct. 75; Baltimore & O. R. Co. v. United States, 200 Fed. 200, 17 I. C. C. 40.

6. United States v. Baltimore 779.

of the New Jersey shore. Arbuckle Brothers were large shippers of sugar and maintained a refinery close to the station. Nearly one-third of the west-bound shipments through the station were made by Arbuckle Brothers, the remaining two-thirds of the tonnage being furnished by the public. For lightering both the west and east-bound freight between the New York station and the New Jersey terminals, Arbuckle Brothers received from the carriers an allowance ranging from three to four and one-fifth cents per hundred pound. The Federal Sugar Refining Company, also a refinery of sugar and a competitor of Arbuckle Brothers, had a refinery at Yonkers, New York, adjacent to a pier, and outside the free lighterage limits established by the carriers in the harbor of New York.

This company did not therefore enjoy the benefit of the free lighterage service offered by the carriers under their tariffs to shippers at piers within the limits. Since Arbuckle Brothers received an allowance on delivering their sugar at the New Jersey terminal and as it was compelled, on the other hand, to pay three cents per hundred pounds for having its sugar delivered at the same terminal, the Federal Sugar Refining Company contended that the carriers were subjecting it to an unlawful discrimination when they declined to give it a small allowance for lightering its sugar to the same place and in the same manner. Under these facts, the Commission held that the services rendered by Arbuckle Brothers was purely accessorial in delivering its own sugar at the New Jersey terminal.

While the Commission recognized that a carrier may lawfully pay the owner of freight for services connected with transportation,<sup>7</sup> it held that the lighterage service was no part of the transportation. The payment of the allowance to Arbuckle Brothers and a refusal to allow the Federal Sugar Refining Company compensation for similar services, was held to be an unjust dis-

7. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22;

Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66.

crimination. The Commerce Court and the national Supreme Court, however, held that the services rendered by Arbuckle Brothers were not accessorial but were a part of the transportation from the public receiving station of the carriers in New York to their terminals in New Jersey, and as the carriers were required to furnish the transportation, there was nothing in the statute to prevent them from employing others to do the work. The payment to one, under the circumstances, and a refusal to pay the other, was not an unjust discrimination because one was situated within the free zone and the other beyond. This condition created a dissimilar circumstance justifying inequality of treatment.

**§ 189. Rebating Part of Freight Rates in Payment for Land for Right of Way.** A common carrier subject to the control of the Act may not pay or return to the shipper any part of an interstate freight rate under any pretense whatever. Thus, a contract whereby a carrier agreed to pay a shipper a certain per cent of the rates paid for the shipment of lumber, in payment of land purchased for a right of way, is illegal, although the amount of the rebate was much less than the value of the land.<sup>8</sup>

**§ 190. Assisting One Shipper to Collect Private Charges and Refusing Same Service to Another.** A common carrier may not lawfully assist one of its shippers to collect his own private charges against a consignee and, under similar conditions, refuse to perform the same service for another. That the services were voluntary on the part of the carrier and not compulsory does not affect their discriminatory nature. For example, shipments of freight from Canada were consigned to custom brokers at Newport, Vt., a port of entry, who paid the custom charges and then forwarded the shipments to the consignees in the United States.

An agent of the defendant carrier was also a licensed custom broker and he was permitted to for-

8. *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 316, 57 L. Ed. 1498, 33 Sup. Ct. 887.



ward shipments consigned to him without prepayment of the charges, an arrangement having been made by which the defendant collected custom duties and his brokerage fees for him on delivery. The defendant carrier refused to perform similar services for another broker at the same place. The Commission held that such a practice amounted to unlawful discrimination.<sup>9</sup>

**§ 191. Discrimination in Demanding Cash Payment of Some Shippers and Extending Credit to Others—Conflicting Decisions.** Under the common law a carrier had the right to require the prepayment of charges of freight from one shipper and to give credit for such charges to another shipper similarly situated.<sup>10</sup> But whether an interstate common carrier is guilty of unreasonable or undue preference under the Interstate Commerce Act in requiring the prepayment of freight charges from one shipper and extending credit to another, similarly situated, is under the decisions of the Federal circuit courts of appeal doubtful, though the Interstate Commerce Commission has indicated that a carrier may extend credit “within reasonable and non-discriminatory limits” but what those limits were, the Commission did not decide.<sup>11</sup>

The Federal Circuit Court of Appeals for the Eighth Circuit, Judge Hook dissenting, held that a carrier subject to the Federal statute, had the right to require prepayment of charges for transportation from one and to give credit to another shipper similarly situated, such a preference not being unreasonable within

9. *Emery v. Boston & M.-R. So.*, 38 I. C. C. 636.

10. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; *Southern Indiana Exp. Co. v. United States Exp. Co.*, 35 C. C. A. 172, 92 Fed. 1022, 88 Fed. 659; *Gulf, C. & S. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407; *Little Rock & M. R. Co. v. St. Louis Southwestern Ry. Co.*, 11

C. C. A. 417, 63 Fed. 775, 26 L. R. A. 192; *Oregon Short-Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 9 C. C. A. 409, 61 Fed. 158; *Brown & Brown Coal Co. v. Grand Trunk Ry. System*, 159 Mich. 565, 29 L. R. A. (N. S.) 840, 124 N. W. 528; *Randall v. Richmond & D. R. Co.*, 108 N. C. 612, 13 S. E. 137.

11. *Boise Commercial Club v. Adams Exp. Co.*, 7 I. C. C. 115.

the meaning of the statute.<sup>12</sup> The Circuit Court of Appeals for the Fifth Circuit also held that under the Interstate Commerce Act a common carrier might demand prepayment from one connecting carrier and not from another.<sup>13</sup>

On the other hand the Federal Circuit Court of Appeals for the Sixth Circuit decided that a carrier violated the Elkins Act in giving credit to a shipper while denying the same privilege to another, although the other shipper did not know of the partiality and and did not demand equal treatment.<sup>14</sup>

§ 192. Deduction from Freight Rates to Pay Shipper for Building Tie Hoist Invalid. The term "rate" as used in the Act means the net cost to the shipper for the transportation of his property, that is, the net amount the carrier receives from the shipper and retains. In determining the net amount in a given case, all money transactions of every kind or character, having a bearing on, or relation to, any particular instance of transportation, whereby the cost to the shipper is directly or indirectly enhanced or reduced, must be taken into consideration.

Applying this test, a contract between a lumber company and a railroad company by which the former agreed to build a tie hoist on the line of the carrier, in consideration for which the railroad company agreed to transport the ties of the lumber company at a certain rate, ten per cent of which was to be deducted and refunded to the lumber company in payment for building the hoist until the amount refunded was equal to the cost of construction, was held to be invalid as it gave

12. *Gannett-Robinson Commission Co. v. Chicago & N. W. R. Co.*, 94 C. C. A. 217, 162 Fed. 161, 21 L. R. A. (N. S.) 522, 15 Ann. Cas. 612.

13. *Gulf C. & S. Ry. Co. v. Miami S. R. Co.*, 79 C. C. A. 142, 25 Fed. 307.

14. *Hooking Valley R. Co. v. United States*, 127 C. C. A. 245, 216 Fed. 735. To the same effect under state laws: *Wadley Southern R. Co. v. State*, 187 Ga. 497, 73 S. E. 741; *Adams Exp. Co. v. State*, 191 Ind. 312, 67 N. E. 1002.

the lumber company an undue advantage over other shippers.<sup>15</sup>

**§ 193. Difference in Rates on Freight Not Justified by Different Methods of Loading.** A provision in the tariff of a carrier directing that coal loaded into a car from wagons or sleds at a side track would be subject to an additional charge of fifty cents per ton, while a similar charge was not made when cars were loaded from a tipple, was sought to be upheld by a carrier on the ground that the discrimination was justified by the difference in cost of service; but the Commission held that, regardless of the longer time consumed in loading cars from wagons, the practice was an unlawful discrimination against those who did not own tipples. "Making certain charges," said the Commission,<sup>16</sup> "for the transportation of coal shipped in car-loads when the car is loaded by tipple and exacting a higher charge when it is loaded in some other way, and for that reason, is not justified by difference in cost to the carrier between different methods of loading, or by the other facts appearing in this case, renders the higher rate thus made unreasonable and unduly discriminatory, first, as against complainant, and second, as against all other shippers of coal except those who load by tipple, and constitutes a violation of sections 1 and 3 of said Act."

**§ 194. Carrier "Spotting" Cars for One Shipper and Refusing Same Service to Another Similarly Situated.** The obligation of a common carrier concerning the delivery and receipt of car-load freight to and from private sidings and industrial tracks is restricted to the acceptance and delivery at a point on the siding a sufficient distance from the point of connection with the tracks of the carrier to clear such tracks. The carrier is not required to place or "spot" cars at such points on an industrial railroad that the shipper may designate.

15. *Chesapeake & O. R. Co. v. Standard Lumber Co.*, 98 C. C. A. 81, 174 Fed. 107.

16. *Glade Coal Co. v. Baltimore & O. R. Co.*, 10 I. C. C. 226.



But if a railroad company voluntarily undertakes to perform such a service for some shippers and refuses to perform the same service for other shippers under substantially similar circumstances, the discrimination is undue.<sup>17</sup> An allowance therefore to certain terminal railroads of \$2.50 per car for switching cars to the furnace plants of certain companies while denying the same allowance to one terminal company doing similar switching, constituted an undue preference.<sup>18</sup>

**§ 195. Trap Car Service Not Unlawful If Practiced Without Discrimination.** For the purpose of eliminating the cost of drayage and lessening the congestion in freight stations, carriers frequently furnish shippers on private sidings empty cars which are loaded with less-than-carload shipments and then are hauled to local freight or transfer stations where the shipments are assorted and placed in other cars to be forwarded to their respective destinations.

Conversely inbound freight is frequently delivered in the same way from the freight stations to private sidings. When such cars were loaded to a prescribed limit, it appeared in evidence in an investigation before the Commission that the carriers usually made no charge for this special service in receiving and delivering less than carload shipments. This practice is known as the trap or ferry car service, and, when given to shippers without any undue discrimination or preference, is not unlawful.<sup>19</sup>

17. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 38 I. C. C. 40, in which the Commission said: "The service over private tracks from the lines and coke ovens of shippers to the rails of the carrier is not now nor was it during the period of the action either compelled or prohibited by the statute or by common law. To furnish it or to withhold it is

within the discretion of the defendant; but which ever course is pursued the statutory prohibition of unjust discrimination and unreasonable preference or advantage must be observed."

18. *Buffalo Union Furnace Co. v. Lake Shore & M. S. Ry. Co.*, 21 I. C. C. 620.

19. *Trap or Ferry Car Service Charges*, 34 I. C. C. 516.



## CHAPTER X

### UNLAWFUL PREFERENCES IN RATES AND PRACTICES BETWEEN CITIES, COMMUNITIES AND LOCALITIES

- Sec. 196. Preferences Between Cities and Localities Under the Common Law Not Forbidden.
- Sec. 197. Equality Between Communities under Similar Circumstances and Conditions Required.
- Sec. 198. When Higher Rates to One Point Than to Another are Unjustly Discriminatory.
- Sec. 199. All Localities Entitled to Non-Discriminatory Rates.
- Sec. 200. Undue Prejudice Between Localities Resulting from Different Interstate and Intrastate Rates—Shreveport Case.
- Sec. 201. Every City and Locality Entitled to Benefit of Natural Advantages.
- Sec. 202. Rates to One Locality *Per Se* Reasonable, Unlawful if Another Locality is Prejudiced Thereby.
- Sec. 203. Basing Point System of Rate Making—Legal but Subject to Control of Commission.
- Sec. 204. Discriminations and Preferences Produced by Competition Between Localities not Undue or Unreasonable.
- Sec. 205. Limitation Upon Competition in Determining Whether Discrimination is Unjust or Preference Undue.
- Sec. 206. Difference in Amount of Traffic Between Localities Similarly Situated no Justification for Discriminatory Rates and Fares.
- Sec. 207. Carrier not Guilty of Discrimination Between Localities When it Does not Participate in Rates to Favored Point.
- Sec. 208. Discrimination Between Different Coal Fields Served by Different Carriers not Unlawful.
- Sec. 209. Discrimination in the Establishment and Maintenance of Group Rates.
- Sec. 210. Different Rates in Opposite Directions Over Same Lines Not Discriminatory.
- Sec. 211. Discrimination in Absorbing Switching Charges at One Point and Refusing at Another.
- Sec. 212. Discrimination Through Joint Rates Between Two Localities Similarly Situated Prohibited, When.
- Sec. 213. Differentials Between Atlantic Coast Cities Legitimately Based upon Competitive Relations.
- Sec. 214. Maintaining Higher Rates on Branch Line Parallel to Main Line Serving Same Territory.
- Sec. 215. Proportional Part of Through Rate Lower Than Local Rates Between Same Points Not Discriminatory.
- Sec. 216. Rebilling and Reshipping Privilege at Nashville on Grain From Ohio River to Southeastern Points Discriminatory.

- Sec. 217. Differential Between Cities on Opposite Banks of Rivers Crossed by Expensive Bridges.
- Sec. 218. Carriers Unduly Favoring Industries on Their Own Lines as Against Competitors on Other Lines.
- Sec. 219. Stopping Carload Shipments at Points *En Route* to Finish Loading Discriminatory, When.

**§ 196. Preferences Between Cities and Localities Under the Common Law Not Forbidden.** Neither under the common law, nor under the English statute upon which the Interstate Commerce Act was largely based, was discrimination of carriers between cities and independent communities forbidden. The word "locality" does not appear in the equality clause of the English Act of 1854 upon which Section 3 was modeled. A shipper under the common law, had the right to demand a reasonable rate, but what the carrier charged another shipper *in another locality* did not concern him. One locality had no legal right to complain of the rates charged to shippers of another community.

This absolute freedom from governmental control in the practice of discrimination between cities led to many serious abuses, and the carriers had, prior to the adoption of the Act to Regulate Commerce, the power to make and unmake cities by granting preferential rates to one city over another. Equal treatment between localities similarly situated is, therefore, a distinct American doctrine forced upon the carriers in the passage of Section 3 largely because of the arbitrary and unreasonable preferences practiced by them in the days of immunity from federal control.

**§ 197. Equality Between Communities under Similar Circumstances and Conditions Required.** The pervading principle of sections 2 and 3 is equality for all communities and persons under substantially similar circumstances and conditions. This rule demands such an adjustment of rates that shall not discriminate unduly in favor of the business of some localities and prove destructive to the same pursuits in other localities, and prohibits carriers from imposing excessive rates where the absence of competition affords opportunity to do so,

and thus unfairly stimulate favored communities at the expense of others.<sup>1</sup> Thus, where it appeared that a carrier owning a line between the Dakotas and Milwaukee, operated two routes between Minneapolis and Milwaukee, a rate of 7½ cents per hundred pounds on wheat to points on one of these routes, and a rate of 15 cents per hundred pounds to points on the other route, was held to unduly favor the cities on the former route.<sup>2</sup>

§ 198. **When Higher Rates to One Point Than to Another are Unjustly Discriminatory.** Mere proof that the rates to one locality are higher than to another locality, does not establish undue preference or unjust discrimination under the statute. It must be further shown that the general condition of transportation and the circumstances surrounding the traffic are substantially similar and that such a relationship exists between the two localities that the commerce of one is adversely affected, and the commerce of the other is materially benefited, because of a higher rate to one than to the other. Applying this principle, the Commission held that there was a closer geographical and economic relation between the cities of Astoria, Or., and Seattle and Tacoma, Wash., than was reflected in the tariffs of the carriers to both points and a discontinuance of the discrimination was ordered.<sup>3</sup>

§ 199. **All Localities Entitled to Non-Discriminatory Rates.** Every locality is entitled to not only a reasonable rate but a rate that is non-discriminatory. A carrier does not fulfill its obligations under the law by giving the community a reasonable rate. It must view its rates as a whole and must abstain from effecting

1. *Daniels v. Chicago*, R. I. & P. Ry. Co., 6 I. C. C. 458; *Page v. Delaware, L. & W. R. Co.*, 6 I. C. C. 148; *Manufacturers and Jobbers' Union of Mankato v. Minneapolis & St. L. Ry. Co.*, 4 I. C. C. 79; *In re Chicago, St. P. & K. C. Ry.*, 2 I. C. C. 231; *Board of*

*Trade of Farmington v. Chicago, M. & St. P. Ry. Co.*, 1 I. C. C. 215, 1 I. C. R. 608.

2. *Board of Trade of Farmington v. Chicago, M. & St. P. Ry. Co.*, 1 I. C. C. 215, 1 I. C. R. 608.

3. *City of Astoria v. Spokane, P. & S. Ry. Co.*, 38 I. C. C. 16.

thereby any change or preference to one community over another, which do not arise necessarily out of the transportation advantages which one has over the other.<sup>4</sup>

**§ 200. Undue Prejudice Between Localities Resulting from Different Interstate and Intrastate Rates—Shreveport Case.** Notwithstanding the provision of Section 1 excluding the application of the statute to the transportation of property wholly within one state and not shipped to another state or foreign country, Congress has the power to control strictly intrastate rates even when established by state authority, when those rates result in an unjust discrimination or undue preference against interstate traffic, and, by the passage of sections 2 and 3, it has lawfully delegated to the Interstate Commerce Commission the power to forbid such injurious discriminations; for the language of these two sections is sweeping enough to embrace all the discriminations of the sort described therein which it was within the power of Congress to condemn.

There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carriers. The statute applies to all interstate railroads and makes unlawful every act which operates to the undue prejudice of any locality.<sup>5</sup> The case cited is known as the Shreveport case and marks an epoch in the regulation of interstate rates. It appeared in the order and decision of the Commission in that case<sup>6</sup> that the interstate rates from Shreveport, La., to Dallas, Tex., and intermediate points on the line of the defendant carrier were very much higher in proportion to distance than the state rates maintained by the carrier from Dallas, Tex., to the same intermediate points in the state of Texas. For example, the rate on farm wagons from Shreveport, La., to Mar-

4. Railroad Commission of Ne- v. United States, 234 U. S. 342, 58  
vada v. Southern P. Co., 21 I. C. C. L. Ed. 1341, 34 Sup. Ct. 833.  
329.

5. Houston, E. & W. T. R. Co. 6. Meredith v. St. Louis S. W.  
Ry. Co., 23 I. C. C. 31.



shall, Tex., a distance of forty-two miles, was fifty-six cents per hundred pounds, while the rate from Dallas to Marshall, a distance of one hundred forty-seven miles, was only thirty-six cents.

Under such an adjustment of freight rates, due to the low intrastate rates, Shreveport was severely handicapped in its competition with Dallas for the trade of the intervening territory, most of which was situated in the state of Texas. It appeared that operating conditions were substantially the same throughout the entire line and in both directions between these two cities. The question presented to the Supreme Court was, therefore, whether such a rate situation would constitute undue prejudice to Shreveport and undue preference to Dallas within the meaning of the third section of the Act. "Here, the Commission expressly found," said Mr. Justice Hughes, "that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate.

"The question was thus not simply one of transportation that was 'wholly within one State.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

"It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. The Commerce Court sustained the authority of the Commission and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate."

**§ 201. Every City and Locality Entitled to Benefit of Natural Advantages.** Carriers are neither required nor permitted to undertake by adjustment of rates or otherwise to impair or neutralize the natural commercial advantages resulting from location or other favorable condition of one territory in order to put another territory on an equal footing with it in a common market.<sup>8</sup> Each locality is entitled to the benefit of its natural

7. An order of the Interstate Commerce Commission compelling carriers to remove discrimination against interstate commerce by raising intrastate fares and rates, must be definite as to the territory or points to which it applies and must conform to a high standard of certainty. *American Exp. Co. v. State ex rel. Caldwell*, 244 U. S. 617, 61 L. Ed. 1352, 37 Sup. Ct. 656; *Illinois Cent. R. Co. v. Public Utilities Commission*, 245 U. S. 493, 62 L. Ed. —, 38 Sup. Ct. 204.

8. *Interstate Commerce Commission v. Dittenbaugh*, 222 U. S.

42, 56 L. Ed. 83, 32 Sup. Ct. 22; *Blodgett-Milling Co. v. Chicago, M. & St. P. Ry.*, 23 I. C. C. 448; *Red River Oil Co. v. Texas & P. Ry.*, 23 I. C. C. 438; *Sioux City Terminal Elevator Co. v. Chicago, M. & St. P. Ry.*, 23 I. C. C. 98; *In re Meat Rates*, 22 I. C. C. 160; *Elk Cement & Lime Co. v. Baltimore & O. R. R.*, 22 I. C. C. 84; *Carstens Packing Co. v. Northern P. Ry.*, 22 I. C. C. 77; *East St. Louis Cotton Oil Co. v. St. Louis & S. F. R. R.*, 20 I. C. C. 37; *Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry.*, 6 I. C. C. 195, 4 I. C. R. 592; *Raworth v. Northern*

advantages,<sup>9</sup> and if this results in prejudice to one and an advantage to another, it is not an undue prejudice forbidden by the statute. It is not the duty of the Commission to equalize natural advantages between localities through the adjustment of tariff rates.<sup>10</sup> A disadvantage in location is a burden which in the very nature of things the merchants and shippers of a community must always bear.<sup>11</sup>

§ 202. Rates to One Locality *Per Se* Reasonable, Unlawful if Another Locality is Prejudiced Thereby. If rates are relatively unjust, so that an undue preference accrues under them to one locality, and an undue prejudice results to another locality, the law is violated although the higher rates are not in themselves unreasonable. The fact that rates are *per se* reasonable

P. R. R., 5 I. C. C. 234, 3 I. C. R. 357; James & Mayer Buggy Co. v. Cincinnati, N. O. & T. P. Ry., 4 I. C. C. 744, 3 I. C. R. 682.

9. Douglass & Co. v. Illinois C. R. R., 31 I. C. C. 587; Page Milling Co. v. Norfolk & W. Ry., 30 I. C. C. 605; Hormel & Co. v. Chicago, M. & St. P. Ry., 30 I. C. C. 98; Wichita Business Ass'n v. Atchison, T. & S. F. Ry., 30 I. C. C. 15; Curry & Whyte Co. v. Duluth & I. R. R. R., 30 I. C. C. 1; Hughes' Creek Coal Co. v. Kanawha & M. Ry., 29 I. C. C. 671; Atlanta Freight Bureau v. Nashville, C. & St. L. Ry., 29 I. C. C. 476; In re advances Kansas-California Flour Rates, 29 I. C. C. 459; In re Advances Lumber, Arkansas etc., to Iowa, 29 I. C. C. 1; Mississippi River Case, 28 I. C. C. 47; Commercial Club of Duluth v. Baltimore & O. R. R., 27 I. C. C. 639; Board of Trade of Chicago v. Chicago & A. R. R., 27 I. C. C. 530; Topeka Traffic Ass'n v. Alabama & V. Ry., 27 I. C. C. 428; In re Wheat and Flour Rates, Missouri River-Illinois, 27 I. C. C. 286; West

Virginia Rail Co. v. Baltimore & O. R. R., 26 I. C. C. 622; National Refrigerator & Butchers' Supply Co. v. St. Louis, I. M. & S. Ry., 26 I. C. C. 524; Meridian Fertilizer Factory v. Vicksburg, S. & P. Ry., 26 I. C. C. 351; Wichita Falls System Joint Coal Rate Cases, 26 I. C. C. 215; Greenbaum Co. v. Chesapeake & O. Ry., 25 I. C. C. 352; Globe Milling Co. v. Chicago, M. & St. P. Ry., 24 I. C. C. 594.

10. Board of Trade of Kansas City, Missouri v. St. Louis & S. F. R. Co., 32 I. C. C. 297; Slider v. Southern Ry., 24 I. C. C. 312; Oklahoma Portland Cement Co. v. Missouri, K. & T. Ry., 24 I. C. C. 158; In re Salt Rates, 10 I. C. C. 148.

11. San Toy Coal Co. v. Akron, C. & Y. Ry., 34 I. C. C. 93; Northern Pine Mfrs. Ass'n. v. Chicago & N. W. Ry., 33 I. C. C. 360; Lebanon Commercial Club v. Louisville & N. R. R., 28 I. C. C. 301; In re Furniture Rates in Northwest, 26 I. C. C. 655; Saginaw Board v. Grand Trunk Ry., 17 I. C. C. 128.

does not prove that they may not be unlawful on other grounds. For example, the Commission found the rates for the transportation of bituminous coal in car-loads from Kanawha and New River Districts in West Virginia to Culpeper and Manassas, Va. to be reasonable, but on comparison with lower rates to Alexandria, Va., and Washington, D. C., the rates to Culpeper and Manassas were held to be unduly discriminatory.<sup>12</sup>

**§ 203. Basing Point System of Rate-Making Legal but Subject to Control of Commission.** The system of making rates upon certain basing lines or points is not illegal.<sup>13</sup> Under this system, rates for certain sections of the country are established by fixing a certain rate to the basing point and to other stations in the same group by adding the local rate from the basing point.<sup>14</sup> Thus the rate adjustment between the east and the west is built upon basing lines at the Mississippi River and at the Missouri River.

The Ohio River crossings form a similar basing line on traffic to and from the south-east; but it must not be assumed that a basing line for rates may be established and be made an impassible barrier for through rates, or that cities or markets located at or on such basing lines have any inviolable possession of, or hold upon the right to distribute traffic to or from the territory lying beyond.<sup>15</sup>

12. *Bennett & Son v. Chesapeake & O. R. Co.*, 38 I. C. C. 310.

13. *Interstate Commerce Commission v. Clyde S. S. Co.*, 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45.

14. *Appalachia Lumber Co. v. Louisville & N. R. Co.*, 25 I. C. C. 193; *Suffern Grain Co. v. Illinois Cent. R. Co.*, 22 I. C. C. 178; *Columbia Grocery Co. v. Louisville & N. R. Co.*, 18 I. C. C. 502; *Kansas City Transp. Bureau v. Atchison T.*

*& S. F. Ry. Co.*, 15 I. C. C. 498; *Randolph Lumber Co. v. Seaboard Air Line Ry. Co.*, 13 I. C. C. 601.

15. *Greenbaum Co. v. Louisville & N. R. Co.*, 31 I. C. C. 699; *American Coal & Supply Co. v. Chicago & N. W. R. Co.*, 30 I. C. C. 492; *City of Montezuma, Georgia, v. Central of Georgia Ry. Co.*, 28 I. C. C. 280; *Taylor Dry Goods Co. v. Missouri P. Ry. Co.*, 28 I. C. C. 205; *LaGrange Chamber of Commerce v. Atlanta & W. P. R. Co.*, 28 I. C. C. 178; *Board of Trade of Carrollton, Georgia v. Central of Georgia Ry. Co.*, 28 I. C. C. 154; *Interior*



The United States Supreme Court has held that rates fixed upon basing points are not exempt from regulation if unreasonable or discriminatory. An order, therefore, of the Interstate Commerce Commission reducing the class rates from the Atlantic sea-ports to cities on the Missouri River by reducing that part of the through rate which applied to the haul between the Mississippi and Missouri Rivers was sustained, and the court held that the Commission did not thereby artificially divide up the country into freight zones tributary to given trade and manufacturing centers.<sup>16</sup> "Let us see, therefore," said the Court, "upon what grounds the Commission proceeded. The Commission is accused by the railroad companies of attempting to substitute an artificial system of ratemaking for a long-established system, and to protect or foster particular localities of production and distribution. Certain remarks of the Commission are cited to support the charge. We think the charge puts out of view all else that was said by the Commission, puts out of view the comprehensive consideration the Commission took as exhibited in the explicit declaration made after quoting the local class rates between the rivers in cents per hundred pounds, that 'these are the rates that are added to the rates up to the Mississippi River crossings to make up the through rates from the Atlantic seaboard to the Missouri River cities.' Are these rates, as so used, and the through rates resulting therefrom, unwarrantably high or unduly discriminatory or unjustly prejudicial? Can they be changed without doing injustice elsewhere?"

"We think the charge also puts out of view the disclaimers of such purpose in the answer of the Commission in its report to Congress, and its insistence that it is constrained by the law to act only on complaint to it and that it is open at all times to be appealed to, to

Iowa Cities Case, 28 I. C. C. 64;  
Spiegle v. Southern Ry. Co., 25 I.  
C. C. 71; Kindel v. New York, N.  
H. & H. R. Co., 15 I. C. C. 555.

16. Interstate Commerce Com-  
mission v. Chicago R. I. & P. R. Co.

218 U. S. 88, 54 L. Ed. 946, 30 Sup.  
Ct. 651; Interstate Commerce Com-  
mission v. Chicago, B. & Q. R. Co.,  
218 U. S. 113, 54 L. Ed. 959, 30 Sup.  
Ct. 660.

redress the grievances any shipper or locality may have. Nor did the Commission ignore or underestimate the manner in which the lines of railroads had been extended or the system of rates or ratemaking which had resulted. That is the system of making rates upon certain basing lines or points. Rates 'break' at such points, it was proved as a result of building independent lines westward. In other words, lines of railroads were built to certain cities from the East, seeking such cities, it may be, because of their natural situation and facilities, and other independent lines building westward, each line fixing its own rates or uniting according to circumstances in joint rates. It is the observance of such points that give and maintain, as we understand the contention of the railroads, to certain cities 'the equal opportunity in the distribution of merchandise with the merchants in the East, and with the merchants to the West of said cities, so far as their business is affected by trade rates.' That this was carefully considered is manifest, for the Commission resisted the argument which was made against basing rates on such points."

**§ 204. Discriminations and Preferences Produced by Competition Between Localities not Undue or Unreasonable.** Subject to the limitation of Section 4 of the Act,<sup>17</sup> that no carrier shall charge a higher rate for a shorter distance than for a longer distance over the same route in the same direction, for like kind of property, without the authorization of the Interstate Commerce Commission, discriminations and preferences between localities produced by competition, whether by water or by railroad, are not undue or unreasonable under the provisions of Section 3;<sup>18</sup> though competition between shippers when the provisions of Section 2 apply thereto, is not a dissimilar circumstance

17. Section 79, *supra*.

18. Interstate Commerce Commission v. Clyde S. S. Co. 181 U. S. 29, 45 L. Ed. 729, 21 Sup. Ct. 512; East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commis-

sion, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; Interstate Commerce Commission v. Alabama Midland R. Co., 168 U. S.

justifying a different rate or charge.<sup>19</sup> A preference in rates in favor of a competitive locality, is not "undue" within the meaning of Section 3. Carriers may, therefore, in fixing their own rates take into account competition with other carriers provided only that the competition is genuine and not a mere pretense.<sup>20</sup>

Competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play a preference, but not an undue preference arising from the voluntary and wrongful act of the carrier.<sup>21</sup> The mere fact of competition, no matter what its extent or character, does not necessarily relieve the carrier of the restraint imposed upon it by the provisions of Section 3;<sup>22</sup> but competition of controlling force cannot be ignored by the Commission in determining whether an advantage in rate at the competitive point is undue or is only chargeable to the carrier because involuntarily made.<sup>23</sup> Ocean competition is also

144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Interstate Commerce Commission v. Cincinnati, P. & V. R. Co.*, 124 Fed. 624; *In re Class and Commodity Rates to Texas v. Missouri, K. & T. Ry. Co.*, 11 I. C. C. 238.

19. *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822.

20. *Interstate Commerce Commission v. Dittenbaugh*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct., 22; *Interstate Commerce Commission v. Chicago Great Western R. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493; *Interstate Commerce Commission v. Detroit, G. H. & M.*

*Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Coke Producers Ass'n v. Baltimore & O. R. Co.*, 27 I. C. C. 125; *Chamber of Commerce of Newport News v. Southern Ry. Co.*, 23 I. C. C. 345; *Colorado Coal Traffic Ass'n v. Atchison, T. & S. F. Ry. Co.*, 18 I. C. C. 572; *Columbia Grocery Co. v. Louisville & N. R. Co.*, 18 I. C. C. 502; *Chamber of Commerce of Chattanooga v. Southern Ry. Co.*, 10 I. C. C. 111.

21. *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516.

22. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; *Chamber of Commerce of Newport News v. Southern Ry. Co.*, 23 I. C. C. 345; *Planters' Gin and Compress Co. v. Yazoo & M. V. R. Co.*, 16 I. C. C. 131.

23. *Sioux City Terminal Elevator Co. v. Chicago, M. & St. P. Ry. Co.*, 23 I. C. C. 98.



a circumstance to be considered in determining whether differences in rates are unduly preferential.<sup>24</sup>

**§ 205. Limitation Upon Competition in Determining Whether Discrimination is Unjust or Preference Undue.** While the courts and the Commission in the cases cited in the foregoing paragraph clearly held that preferences and discriminations produced by competition are not unjust or undue within the meaning of Section 3, the Supreme Court in *Louisville & N. R. Co. v. Behlmer*,<sup>25</sup> recognized that the competitive rule is subject to the important qualifications which were summarized by the court as follows:

“It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles; First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be, not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate-making the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.”

**§ 206. Difference in Amount of Traffic Between Localities Similarly Situated no Justification for Discriminatory Rates and Fares.** While carriers may make

24. *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Pittsburgh Plate Glass Co. v.*

*Pittsburgh, C. C. & St. L. Ry. Co.*, 13 I. C. C. 87.

25. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209.



lower rates to competitive points than are made to intermediate noncompetitive points, they are not at liberty in the selection of these basing points to determine that one town shall have the benefit of a lower rate and that another town shall not, when the means of competition and the surrounding conditions do not materially differ.<sup>26</sup>

A difference in the amount of passenger traffic between two cities similarly situated will not justify a difference in the fares between the two points, and, similarly, the fact that one city is more important from a commercial standpoint, than another, does not entitle it to lower rates. For example, the extension of terminal rates to Santa Clara, San Jose and Marysville, California, on west-bound trans-continental traffic, and the refusal to extend such rates to Santa Rosa, a city similarly situated, was held not to be justified because the amount of traffic to Santa Rosa was not as great as to the other cities.<sup>27</sup> A refusal to grant excursion fares from Toledo, Ohio, to Hamburg, Michigan, a summer resort, while maintaining and granting such fares from Toledo to Whitmore Lake and Lakeland, other resorts similarly situated, constituted an unjust discrimination, and the fact that Hamburg was not as popular as a resort as the others did not debar it from equal treatment under the law.<sup>28</sup>

**§ 207. Carrier not Guilty of Discrimination Between Localities When it Does not Participate in Rates to Favored Point.** A charge of discrimination cannot be sustained by a locality against a carrier that does not serve that locality either directly by its own route or by joint arrangement with other railroads;<sup>29</sup> for the prohibition of Section 3 is directed against unjust discrimination or undue preference arising from the voluntary act of the carrier, and does not include acts that are the result of conditions beyond its control.<sup>30</sup>

26. Board of Trade of Dawson, Georgia, v. Central of Georgia Ry., 8 I. C. C. 142.

27. Santa Rosa Traffic Ass'n v. Southern P. Co., 24 I. C. C. 46, 29 I. C. C. 65.

28. Beach v. Ann Arbor R. Co., 26 I. C. C. 410.

29. St. Louis, I. M. & S. Ry. Co. v. United States, 217 Fed. 80.

30. East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Com-

Upon a complaint that a carrier discriminated against the port of New York and unduly preferred the port of Montreal, it appeared in evidence that the carrier had no voice in making rates to Montreal and did not participate in the movement of the commodity involved to that port, and hence, the Commission held, there was no undue discrimination as there was no participation by the carrier directly or indirectly in the establishment of the rate to Montreal.<sup>31</sup> The test of discrimination is the ability of one of the carriers participating in two through routes to put an end to the discrimination by its own act.<sup>32</sup>

**§ 208. Discrimination Between Different Coal Fields Served by Different Carriers not Unlawful.** The provisions of Section 3 condemning discriminations and preferences between localities apply to different rates by one road or set of roads serving two competing points, but a discrimination resulting from rates between two different coal fields served by different groups of lines, does not fall within the condemnation of the statute.<sup>33</sup>

mission, 39 C. C. A. 413, 99 Fed. 52; *Partridge & Sons Co. v. Pennsylvania R. Co.*, 26 I. C. C. 484; *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45, L. Ed. 719, 21 Sup. Ct. 516, in which Mr. Chief Justice White said: "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe

the statute would involve a departure from plain language, and would be to confound cause with effect."

31. *New York Produce Exchange v. New York Cent. & H. River R. Co.*, 32 I. C. C. 212.

32. *In re Grain, St. Louis & East St. Louis*, 30 I. C. C. 696; *Coke Producers Ass'n of Connellsville Region v. Baltimore & O. R. Co.*, 27 I. C. C. 125; *Ashland Fire Brick Co. v. Southern Ry. Co.*, 22 I. C. C. 115.

33. *Wickwire Steel Co. v. New York Cent. & H. River R. Co.*, 30 I. C. C. 415; *In re advances California-Nevada Lumber Rates*, 28 I. C. C. 313; *In re Coal Rates to Davenport, Iowa*, 26 I. C. C. 140; *In re Coal Rates on Chesapeake & O. Ry. Co.*, 22 I. C. C. 604.

§ 209. **Discrimination in the Establishment and Maintenance of Group Rates.** The Commission has often considered and passed upon the propriety of group rates. While the group or zone principle is often of mutual advantage to shippers and carriers and will not ordinarily be disturbed if the rates are reasonable and non-discriminatory, yet the relative situation of contiguous points cannot be wholly disregarded in rate making without incurring the risk of creating unjust discrimination or advantage to the favored points.<sup>34</sup>

In the application of group rates a discrimination of necessity arises between the near and far edge of the group, but the Commission has generally held that this discrimination is not undue.<sup>35</sup> There must be some point, however, at which the extension or application of the rate must stop, and whether this extension constitutes undue or unjust discrimination must be determined from all the facts of each case.<sup>36</sup>

§ 210. **Different Rates in Opposite Directions Over Same Lines Not Discriminatory.** The fact that rates or fares over a line in one direction between two points are materially higher than the rates or fares in an opposite direction does not establish unjust discrimination; for all the surrounding facts and circumstances must be taken into consideration to determine whether the discrimination is undue.

Differences in grades, a preponderating movement of empty cars in one direction, a greater volume of freight in one direction than the other and other conditions may justify a difference in rates over the same line between the same points.<sup>37</sup> For example, a rate

34. *Hammerschmidt & Franzen Co. v. Chicago & N. W. Ry. Co.*, 30 I. C. C. 71; *Bovaird Supply Co. v. Atchison, T. & S. F. Ry.*, 13 I. C. C. 56.

35. *Southwestern Missouri Millers' Club v. Missouri, K. & T. Ry.*, 22 I. C. C. 422.

36. *Hammerschmidt & Franzen Co. v. Chicago & N. W. Ry. Co.*,

30 I. C. C. 71; *Muskogee Traffic Bureau v. Atchison, T. & S. F. Ry.*, 17 I. C. C. 169; *Mitchell v. Atchison, T. & S. F. Ry.*, 12 I. C. C. 324; *Desel-Boettcher Co. v. Kansas City S. Ry. Co.*, 12 I. C. C. 220; *Imperial Coal Co. v. Pittsburgh & L. E. R. Co.*, 2 I. C. C. 618.

37. *Interstate Commerce Commission v. Louisville & N. R. Co.*,



of sixty-two cents per hundred pounds on freight west-bound between Philadelphia, Pa., and Fort Wayne, Ind. in comparison with a rate of forty-three cents per hundred pounds east-bound was held not to be an unreasonable discrimination.<sup>38</sup> A charge of \$2.00 more for a passenger ticket from Boston, Me., to Janesville, Wis., than for a ticket from Janesville, to Boston was not an unjust discrimination.<sup>39</sup> In another case, the Commission held that rates on certain commodities from Seattle and Tacoma, Wash., to Portland, Ore., were not unjustly discriminatory as compared with the rates from Lime and Gypsum, Ore., to Portland, and Puget Sound points, but the existence of rates east-bound in some instances twice as high as those for substantially the same distance west-bound was found not to be justified.<sup>40</sup>

**§ 211. Discrimination in Absorbing Switching Charges at One Point and Refusing at Another.** The practice of absorbing or refusing to absorb switching charges must not only be reasonable but non-discriminatory.<sup>41</sup> In cases where the traffic moves from the same points of origin and the switching charge is absorbed in the one case and not in the other, there is a violation of Section 2, and the existence or absence of competition in one or the other, does not constitute a substantial dissimilarity of circumstances. Even as to traffic moving from different points of origin, to which Section 3 may be applicable, competitive conditions are

118 Fed. 613; *Pacific Coast Gypsum Co. v. Oregon Washington R. R. & Nav. Co.*, 30 I. C. C. 135; *Hull Vehicle Co. v. Southern Ry. Co.*, 28 I. C. C. 619; *Wilburine Oil Works v. Pennsylvania R. Co.* 18 I. C. C. 548; *Littell v. St. Louis S. W. Ry. Co.*, 18 I. C. C. 187; *Phillips Co. v. Grand Trunk W. Ry. Co.*, 11 I. C. C. 659; *Weil Bros. & Co. v. Pennsylvania R. Co.*, 11 I. C. C. 627; *Hewins v. New York, N. H. & H. R. Co.*, 10 I. C. C. 221; *MacLoon v. Boston & M. R. Co.*, 9 I. C. C. 642; *Duncan v. Atchison,*

*T. & S. F. Ry. Co.*, 6 I. C. C. 85, 4 I. C. R. 385.

38. *Weil Bros. & Co. v. Pennsylvania R. Co.* 11 I. C. C. 627.

39. *MacLoon v. Boston & M. R. Co.*, 9 I. C. C. 642.

40. *Pacific Coast Gypsum Co. v. Oregon-Washington R. R. & Nav. Co.*, 30 I. C. C. 135.

41. *Board of Trade of Chicago, Illinois v. Atchison, T. & S. F. Ry. Co.*, 29 I. C. C. 438; *In re Advances Switching, Chicago, Illinois*, 28 I. C. C. 677; *In re Advances on Ice*, 24 I. C. C. 660.



not always controlling in determining the existence of dissimilar conditions.<sup>42</sup>

Applying these rules, the Commission, in the case cited, held that the imposition of switching charges on interstate carload freight at Richmond, Va., while at the same time no charge of a like character was imposed at Norfolk, Va., on the same traffic, constituted undue discrimination against consignees and consignors of freight at Richmond.<sup>43</sup> But the failure of railroad companies with terminals at Chicago to absorb charges on grain delivered to industries in that city off of their lines while absorbing such charges on other commodities having no competitive relation therewith, did not constitute an undue preference.<sup>44</sup>

### § 212. Discrimination Through Joint Rates Between Two Localities Similarly Situated Prohibited, When.

An undue discrimination against one locality may be effected as well by a joint rate as by a one-line rate, and a carrier that is a party to a joint rate is no less responsible when the undue discrimination under such a rate can be controlled by it, than it would be under similar circumstances under its own one-line rate.<sup>45</sup> If any carrier participates in a joint rate over the territory affected, and is in such position that it may join in such rates or decline to do so, it is then liable for the discrimination which may result from its action in join-

42. Chamber of Commerce of Richmond, Virginia, v. Seaboard Air Line Ry., 31 I. C. C. 552.

43. The Commission based its ruling on its former decisions in the following cases: Duncan & Co. v. Nashville, C. & St. L. Ry., 11 I. C. C. 186; Cattle Raisers' Ass'n of Texas v. Chicago, B. & Q. R. R., 12 I. C. C. 507; City Council of Atchison v. Missouri P. Ry., 12 I. C. C. 111.

44. Board of Trade of Chicago, Illinois v. Atchison, T. & S. F. Ry.,

29 I. C. C. 438; See also Board of Trade of Chicago v. Chicago & A. R. R., 27 I. C. C. 530; Wholesale Fruit & Produce Ass'n v. Atchison, T. & S. F. Ry., 17 I. C. C. 596; Miner v. New York, N. H. & H. R. R., 11 I. C. C. 422; Railroad Commission of Kentucky v. Louisville & N. R. R., 10 I. C. C. 173.

45. Patridge & Sons Co. v. Pennsylvania R. R., 26 I. C. C. 484; Rates from Wallensburg Coal Field, 26 I. C. C. 85.

ing with the other carriers in the discriminatory rate or regulation.<sup>46</sup>

But this principle has no application unless the traffic from both groups of origin is necessarily transported to destination by the same connecting carrier or carriers, and where it is possible for the carrier to put an end to the discrimination by the exercise of its power to refuse to enter into preferential joint or proportional rates.<sup>47</sup> The test of discrimination is the ability of one of the carriers participating in the two through routes to put an end to the discrimination by its own act.<sup>48</sup>

**§ 213. Differentials Between Atlantic Coast Cities Legitimately Based upon Competitive Relations.** Railway companies are not prohibited by the third section from preferring one locality to another unless that preference amounts to an undue or unreasonable one. A preference, without a legitimate excuse, would be in and of itself undue and unreasonable. But the Commission has often held that the differentials between Boston, New York, Philadelphia and Baltimore are legitimately based upon the competitive conditions between the various carriers serving these ports.<sup>49</sup>

46. *In re Grain, St. Louis and East St. Louis*, 30 I. C. C. 696; *Memphis Freight Bureau*, 28 I. C. C. 543; *Coke Producers' Ass'n of Connellsville region v. Baltimore & O. R. R.*, 27 I. C. C. 125; *Scott Paper Co. v. Pennsylvania R. R.*, 26 I. C. C. 601; *Ashland Fire Brick Co. v. Southern Ry.*, 26 I. C. C. 195, 22 I. C. C. 115; *Rates from Wallensburg Coal Field*, 26 I. C. C. 85; *Southern Furniture Mfg. Ass'n v. Southern Ry.*, 25 I. C. C. 379; *Indiana Steel & Wire Co. v. Chicago, R. I. & P. Ry.*, 16 I. C. C. 155.

47. *In re Grain, St. Louis and East St. Louis*, 30 I. C. C. 696; *Coke Producers' Ass'n of Connells-*

*ville region v. Baltimore & O. R. R.*, 27 I. C. C. 125; *Ashland Fire Brick Co. v. Southern Ry.*, 22 I. C. C. 115; *Indianapolis Freight Bureau v. Cleveland, C. C. & St. L. Ry.*, 16 I. C. C. 56.

48. *Hughes Creek Coal Co. v. Kanawha & M. Ry.*, 29 I. C. C. 671; *Coke Producer's Ass'n of Connellsville region v. Baltimore & O. R. R.*, 27 I. C. C. 125.

49. *In re Import Rates*, 27 I. C. C. 245; *Chamber of Commerce of New York v. New York Cent. & H. River R. Co.*, 27 I. C. C. 238; *Chamber of Commerce of New York v. New York Cent. & H. River R. Co.*, 24 I. C. C. 674, 24 I. C. C. 55; *In re Import Rates*, 24 I. C. C.

In the case of *Chamber of Commerce of the State of New York v. New York Cent. & H. River R. Co.*,<sup>50</sup> complainants, merchants of New York City, alleged that the carriers maintained rates, differentials and charges to and from the city and port of New York on import and export traffic having destination or origin in so-called "differential territory," that is, territory bounded on the north by the Great Lakes and a line drawn west from Chicago, Ill., to Dubuque, Ia., and on the east by a line drawn from Pittsburg, Pa., to Buffalo, New York, on the south by the Ohio River and on the west by the Mississippi River, which were unjustly discriminatory against New York and unduly preferential to Boston, Philadelphia and Baltimore. Taking Chicago as a representative point, it appeared in evidence that the all-rail and lake-and-rail rates on export and domestic traffic were lower to Philadelphia and Baltimore than to New York, but the export rate from New York and Boston was the same. The Commission held that the carriers should maintain to these ports through routes and joint rates so that there might be the freest movement of traffic without the necessity of reshipment, and that the carriers serving New York might participate in the movement of traffic to and from Philadelphia and Baltimore under competitive rates while maintaining at the same time higher rates to and from New York.

The Commission therefore held that differentials under New York on all-rail and lake-and-rail export shipments from differential territory to Baltimore should not exceed 3 cents per hundred pounds, and to Philadelphia should not exceed 2 cents per hundred pounds on the classes of the commodities other than grain, flour and iron articles, and that the differentials under New York

78, 24 I. C. C. 678; In the Matter of Differential Freight Rates, 11 I. C. C. 13; Toledo Produce Exchange v. Lake Shore & M. S. Ry. Co., 5 I. C. C. 166, 3 I. C. R. 830; Chamber of Commerce of Boston v. Lake Shore & M. C. Ry. Co., 1 I. C. C. 436, 1 I. C. R. 756.

50. *Chamber of Commerce of the State of New York v. New York Cent. & H. River R. Co.*, 24 I. C. C. 55, 24 I. C. C. 674, 27 I. C. C. 238. See also companion case: *In re Import Rates*, 24 I. C. C. 78, 24 I. C. C. 678, 27 I. C. C. 245.

on all-rail and lake-and-rail shipments of grain should not exceed 1.5 cents per hundred pounds to Baltimore and 1 cent to Philadelphia, and that the differential under New York on all-rail and lake-and-rail export shipments of flour should not exceed 2 cents per hundred pounds to Baltimore and 1 cent per hundred pounds to Philadelphia, and that as to all such traffic, the export rates to and the import rates from Boston should not be lower than the rates to and from New York.

**§ 214. Maintaining Higher Rates on Branch Line Parallel to Main Line Serving Same Territory.** A railroad company operating two parallel lines of railroad serving the same territory, one a main line and the other a branch, is justified in maintaining rates not shown to be unreasonable *per se* on the branch line while maintaining materially lower rates on the main line for like distances to meet cross-country competition of an independent parallel line. For example, the rates on cattle and hogs from cities in Nebraska on the Holdrege-Cheyenne branch of the Chicago, Burlington & Quincy Railroad to St. Joseph, Missouri, were found to be higher than rates from the cross-country cities situated on the main line of the same company. It appeared that the rates on the main line were lower because of cross-country competition of the Rock Island and Union Pacific railroad companies. The Commission held that the carrier was justified in maintaining lower rates on the main line because of the competition with the other independent railroads.<sup>51</sup>

**§ 215. Proportional Part of Through Rate Lower Than Local Rates Between Same Points Not Discriminatory.** In the absence of a justifying explanation, a through rate in excess of the sum of the locals, applicable to the same traffic, over the same route, is an unreasonable rate.<sup>52</sup> In fact, as a rule, the through rate

51. Nebraska State Railway Commission v. Chicago, B. & Q. R. Co., 36 I. C. C. 218, following a similar ruling in Planters' Gin & Compress Co. v. Yazoo & M. V. R. Co., 16 I. C. C. 131.

52. Winona Carriage Co. v. Pennsylvania R. Co., 18 I. C. C.



should be less than the sum of the local rate.<sup>53</sup> A carrier may, therefore, accept and receive a smaller sum for its proportion of a through rate than the charges for the transportation of the same commodity between the same points.<sup>54</sup> The conditions and circumstances attending the transportation of through traffic are dissimilar from those affecting purely local traffic, and hence a difference in the rates between local and through traffic is not an undue discrimination.<sup>55</sup>

**§ 216. Rebilling and Reshipping Privilege at Nashville on Grain From Ohio River to South Eastern Points Discriminatory.** The practice of carriers in granting a rebilling or reshipping privilege on shipments of grain and grain products at Nashville, Tenn., when transported from the Ohio and Mississippi River crossings to south eastern points in Georgia and adjoining states, while denying the same privilege at Atlanta

334; *Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co.*, 18 I. C. C. 144; *White Bros. v. Atchison, T. & S. F. Ry. Co.*, 17 I. C. C. 288; *Kindel v. New York, N. H. & H. R. Co.*, 15 I. C. C. 555; *Laning-Harris Coal & Grain Co. v. St. Louis & S. F. R. Co.*, 13 I. C. C. 148.

53. *Washington Milling Co. v. Norfolk & W. Ry. Co.*, 27 I. C. C. 546; *Lumbermen's Exch. of St. Louis v. Anderson & S. R. R. Co.*, 24 I. C. C. 220; *Bluefield Shippers' Ass'n v. Norfolk & W. Ry. Co.*, 22 I. C. C. 519; *Railroad Commission of Nevada v. Nevada-California-Oregon Ry. Co.*, 22 I. C. C. 205; *Montgomery Freight Bureau v. Western Ry. of Alabama*, 14 I. C. C. 150; *Coffeyville Vitrified Brick & Tile Co. v. St. Louis & S. F. R. Co.*, 12 I. C. C. 498; *Hilton Lumber Co. v. Wilmington & W. R. Co.*, 9 I. C. C. 17; *Railroad & Warehouse Commission of Missouri v. Eureka Springs Ry. Co.*, 7 I. C. C. 69.

54. *Parsons v. Chicago & N. W. Ry. Co.*, 11 C. C. A. 489, 63 Fed. 903; *New Pittsburgh Coal Co. v. Hocking Valley Ry. Co.*, 26 I. C. C. 121; *Board of Trade of Wichita v. Atchison, T. & S. F. R. Co.*, 25 I. C. C. 625; *Southwestern Shippers' Traffic Ass'n v. Atchison, T. & S. F. Co.*, 24 I. C. C. 570; *Southern Illinois Millers' Ass'n v. Louisville & N. R. Co.*, 23 I. C. C. 672; *Ottumwa Commercial Ass'n v. Chicago, B. & W. R. Co.*, 17 I. C. C. 413; *Bascom Co. v. St. Louis, I. M. & S. Ry. Co.*, 17 I. C. C. 354; *Greater Des Moines Committee v. Chicago, R. I. & P. Ry. Co.*, 17 I. C. C. 54.

55. *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. 336; *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Union Pac. Ry. Co. v. United States*, 117 U. S. 355, 29 L. Ed. 926, 6 Sup. Ct. 772.

and other cities similarly situated, was, by the Commission, held to be a violation of Section 3 of the Act,<sup>56</sup> and by the Supreme Court to be a violation of Section 4 prohibiting carriers from charging a lesser rate for a longer than for a shorter haul without the consent of the Interstate Commerce Commission.<sup>57</sup> This rebilling or re-shipping privilege accorded at Nashville resulted in prolonged litigation before the Commission and the courts.

Under the privilege so granted, the through rates from the Ohio and Mississippi River crossings to the ultimate destination points south east of Nashville were applied. The grain was shipped into Nashville where it was unloaded, elevated or sacked, and, at some time within six months, it was reshipped on to points in the south-east. The net freight charge for the entire movement was based on the through rate from the crossings to the final destination. For example, a shipment moving from Evansville, Ind., to Atlanta, Ga., paid the local rate to Nashville, and then the local rate from Nashville to Atlanta. As the through rate from Evansville to Atlanta was lower than the sums of the locals, the difference between the through rate and the combination was paid back to the shipper after final delivery.

Upon the complaint of shippers at Atlanta and other Georgia cities not favored with the same privilege, the Commission, upon its first hearing, condemned the practice altogether, and held that the reshipping privilege and the application of rates thereunder obtaining at Nashville, was an illegal device by which grain and grain products were transported at less than the tariff rate applicable thereto.<sup>58</sup> But the Commission postponed the effective date of its order entered pursuant to the first report so that it might institute a country-wide investigation of the practice involved. After a hearing, the Commission decided that its order abolishing

56. *Duncan & Co. v. Nashville, C. & St. L. Ry. Co.*, 16 I. C. C. 590, 21 I. C. C. 186, 35 I. C. C. 477.

& N. R. Co., 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113.

58. *Duncan & Co. v. Nashville, C. & St. L. Ry. Co.*, 16 I. C. C. 590.

57. *United States v. Louisville*

the reshipping privilege was too strict.<sup>59</sup> Thereafter, in the Nashville case, the Commission delivered a supplemental report holding that the practice of granting the reshipping privilege at Nashville, while refusing it to Atlanta and other complaining cities, was an undue and unreasonable preference to Nashville, in violation of the statute.<sup>60</sup>

In a suit thereafter to annul the order of the Interstate Commerce Commission, the Commerce Court held that the granting of the reshipping privilege at Nashville was not an undue discrimination within the meaning of the law, but was the result of and was justified by competition of water lines on the Cumberland River from the Ohio River crossings.<sup>61</sup> On appeal to the United States Supreme Court, the judgment of the Commerce Court was reversed and the cause was remanded for a decree to be entered in harmony with the opinion of the court without prejudice to the rights of the carrier to apply to the Commission to be relieved from the operation of the provisions of Section 4. Thereafter, the Commission made the same finding of facts and held that the granting of the privilege to Nashville and a denial of it to other cities, was unlawful.<sup>62</sup>

**§ 217. Differential Between Cities on Opposite Banks of Rivers Crossed by Expensive Bridges.** While two cities lying on different sides of a large river may be so closely related as to form in a broad sense one industrial and commercial community, yet when transportation of interstate freight or passengers is affected through the performance of additional carriage over expensive bridges that involve a very substantial additional outlay of capital, they do not form one community for transportation and rate-making purposes.<sup>63</sup>

59. *In re Substitution of Tonnage*, 18 I. C. C. 280.

60. *Duncan & Co. v. Nashville, C. & St. L. Ry. Co.*, 21 I. C. C. 186.

61. *Louisville & N. R. Co. v. United States*, 197 Fed. 58.

62. *Duncan & Co. v. Nashville, C. & St. L. Ry. Co.*, 35 I. C. C. 477.

63. *In re advances Lumber, southern points to Ohio River crossings*, 34 I. C. C. 652; *Illinois Coal Cases*, 32 I. C. C. 659; *Metropolis Commercial Club v. Illinois Cent. R. Co.*, 30 I. C. C. 40; *Board of Trade of Paducah, Kentucky, v. Illinois Cent. R. Co.*, 29 I. C. C.

Because of the great cost of such structures, a bridge has been regarded as adding a constructive mileage to the carrier's line for which an additional charge may be exacted.<sup>64</sup> For example, in *Norman Lumber Co. v. Louisville & N. R. Co.*,<sup>65</sup> the maintenance of rates from Louisville, Ky., to central freight association territory one cent higher than rates from Cincinnati, Ohio, to equidistant points, and conversely rates from equidistant southeastern territory to Louisville one cent less than those contemporaneously maintained to Cincinnati and other points on the north side of the Ohio River, were held to be non-discriminatory because of the bridge crossing. In other words, the Commission held that Louisville ought not to be considered on the north bank of the river for inbound shipments and on the south bank of the river for outbound shipments.

In the consideration of another complaint, the Commission found that a differential of twenty cents per ton in favor of East St. Louis, Ill., as against St. Louis, Mo., on shipments of coal from certain districts in the state of Illinois was reasonable.<sup>66</sup> Lower rates to Council Bluffs, Iowa, from points in Iowa than from the same places to Omaha, Neb., across the Missouri River, were also upheld, the existence of an expensive bridge over the river creating a dissimilar circumstances.<sup>67</sup>

**§ 218. Carriers Unduly Favoring Industries on Their Own Lines as Against Competitors on Other Lines.** The exercise of a carrier's rate-making power is arbitrary and discriminatory when it seeks to retain for

593; *Norman Lumber Co. v. Louisville & N. R. Co.*, 29 I. C. C. 565, 22 I. C. C. 239; *Manufacturers and Merchants' Ass'n of New Albany, Indiana v. Aberdeen & A. R. Co.*, 24 I. C. C. 331; *Railroad Commission of Iowa v. Illinois Cent. R. Co.*, 20 I. C. C. 181; *Commercial Club of Omaha v. Chicago & N. W. Ry. Co.*, 7 I. C. C. 386; *Freight Bureau of Cincinnati v. Cincinnati, N. O. & T. P. Ry. Co.*, 7 I. C. C. 180.

64. *Railroad Commission of Iowa v. Illinois Cent. R. Co.*, 20 I. C. C. 181.

65. *Norman Lumber Co. v. Louisville & N. R. Co.*, 29 I. C. C. 565

66. *Illinois Coal Cases*, 32 I. C. C. 659.

67. *Commercial Club of Omaha v. Chicago & N. W. Ry. Co.*, 7 I. C. C. 386.



itself a market at points on its line for the sole benefit of producing points also on its own line to the exclusion of all others.

An attempt to restrict traffic to movements between points on its own line is never justified.<sup>68</sup> Thus, joint rates on lumber from points in Texas and Louisiana by way of the original lines and the Santa Fe to points on the lines of the Santa Fe system in Oklahoma were found to be unjustly discriminatory to the extent that they exceeded rates in effect from other points on the Santa Fe system in Texas and Louisiana to the same points of destination.<sup>69</sup> Likewise, joint rates on lumber from Leesville, La., by way of the Kansas City Southern railroad and the Santa Fe system to points on the latter road in Oklahoma higher than contemporaneous rates maintained from competitive points on the Santa Fe in Louisiana, were held to be unjustly discriminatory.<sup>70</sup>

**§ 219. Stopping Carload Shipments at Points En Route to Finish Loading Discriminatory, When.** The service of stopping carload shipments in transit for the purpose of finishing loading or to partially unload is of great value not only to the shippers immediately concerned in the transportation, but to the carriers as well, through the better utilization of their equipment.<sup>71</sup> In the case cited, the Commission refused to authorize the discontinuance of such a practice by carriers in central freight association and western classification territories; but it appeared in that case, however, that the service was not restricted to particular stations.

A rule of western carriers permitting the stopping of cars of livestock for additional loading at a charge of \$2.00 per car was withdrawn by the carriers, and the Commission, upon a general investigation of the

68. *Nona Mills Co. v. Kansas City S. Ry. Co.*, 39 I. C. C. 125; *In re advances Lumber, Texas, etc., to Oklahoma, etc.*, 28 I. C. C. 471; *Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 364.

69. *Luther & Moore Lumber Co.*

*v. Texas & N. O. R. Co.*, 42 I. C. C. 88.

70. *Nona Mills Co. v. Kansas City S. Ry. Co.*, 39 I. C. C. 125.

71. *In re Stopping Cars in Transit to Complete Loading*, 36 I. C. C. 130.

subject, held that the discontinuance of the service as it then existed, was proper. It appeared that the shippers took advantage of the opportunity to load or unload by substituting tonnage and thus defeat the lawful rate. The carriers also urged that the stopping of livestock in transit to complete the load disarranged the train schedules and resulted in serious delays.<sup>72</sup> Subsequently one of the defendant carriers in the Hoyt case re-established the service of stopping cars of hogs to finish loading at only nine stations on its line, one of them being Winona, Minn. Upon the complaint of a packing company at Winona alleging that such a practice was discriminatory in that the transit service was not general and open to all on equal terms at all stations, the Commission ordered the carrier to desist from the practice unless similar transit service was maintained at all stations on the line.<sup>73</sup>

72. *Hoyt & Bergen v. Chicago & N. W. Ry. Co.*, 42 I. C. & N. W. Ry. Co., 32 I. C. C. 319. C. 189.

73. *Interstate Packing Co. v.*

## CHAPTER XI

### UNLAWFUL PREFERENCE OR ADVANTAGE TO PARTICULAR KINDS OF TRAFFIC

- Sec. 220. Unreasonable Preferences to any Particular Description of Traffic.
- Sec. 221. Passage of Statute Prohibiting Discriminations Stimulated Movement for a More Uniform Classification.
- Sec. 222. Duty of Commission When Classification is Used to Effect Unjust Discrimination.
- Sec. 223. Controlling Considerations in Making Classifications of Freight.
- Sec. 224. Discriminations and Preferences in the Classifications of Commodities.
- Sec. 225. Differential Between Raw Material and Manufactured Products—Grain and Flour, Livestock and Meats, Etc.
- Sec. 226. Differential between Carload and Less than Carload Rates Lawful.
- Sec. 227. Relation Between Carload and Less Than Carload Rates Must not be Excessive.
- Sec. 228. Application of Carload Rates to Carload Lots when Goods Belong to Several Owners.
- Sec. 229. Wheat and Coarse Grain Not "Like Traffic" Requiring Same Rate.
- Sec. 230. Different Uses to which Commodity is Put, No Justification For Different Rates.
- Sec. 231. Justifiable Discrimination Between Shipments of Oil in Barrels and in Tank Cars.
- Sec. 232. Relationship of Rates on Lumber and Lumber Products Must be Free From Discrimination.
- Sec. 233. Differentials Between Similar Commodities Justified by Different Conditions and Circumstances Affecting Transportation—Lumber and Logs.
- Sec. 234. Lower Rates on Returned Shipments Illegal Except When Refused by Consignees.

**§ 220. Unreasonable Preferences to any Particular Description of Traffic.** The statute also prohibits any undue or unreasonable preference or advantage to any particular description of traffic in any respect whatsoever. For convenience in making transportation rates and charges, freight is arranged and put into different classes according to the expense of carriage, bulk, value, risk, competition, and other considerations

affecting the cost and value of the transportation service.

Notwithstanding the repeated efforts of the Interstate Commerce Commission to secure uniformity in classification throughout the country, different classifications have been and are still maintained in various sections of the country and frequently articles classed together in one section are placed in separate classes in another section of the country. Since the enactment of the Act to Regulate Commerce, the number of separate classifications has been steadily reduced, and hundreds of articles are given one and the same rate by being placed in one class. Without an arrangement classifying the freight into classes, the carriers would be compelled to fix a rate on each one of the several hundred thousand articles carried by them. The prevention of undue preference against particular kinds of traffic, therefore, requires the proper classification of freight.

**§ 221. Passage of Statute Prohibiting Discriminations Stimulated Movement for a More Uniform Classification.** The prohibition of unjust discriminations by the passage of the Act to Regulate Commerce stimulated a movement for uniformity in classification of freight. At the time of the passage of the statute, there was great confusion in the traffic situation because of the multiplicity of classifications. Often two or more classifications were in effect on one road. One carrier had, in 1883, nine different classifications in effect for traffic originating on its own line. Upon the adoption of the Interstate Commerce Act, the first important step to secure greater uniformity in classification was begun by the establishment of the official classification which was generally adopted throughout the territory north of the Ohio and Potomac rivers and east of a line drawn from Chicago to St. Louis and the junction of the Mississippi and Ohio rivers. During the year 1889, practically all the railroads operating through the territory from Chicago, St. Louis and the Pacific Coast adopted what is now known as the Western Classifica-



tion, and, in the same year, all the carriers south of the Ohio River and east of the Mississippi River adopted the classification now known as the Southern classification. There are, therefore, at the present time, three great classifications, the Official, Western and Southern, subject to some exception sheets and commodity rates of the individual lines and also a limited use of certain state classifications, transcontinental tariffs, and the Canadian classification. Sometimes these classifications overlap. Freight shipped from a point in one territory to a point in another is sometimes governed by the classification of the place of destination and at other times by the classification of the point of origin.<sup>1</sup>

**§ 222. Duty of Commission When Classification is Used to Effect Unjust Discrimination.** The classification of an article of freight may be used as a device to effect an unjust discrimination in violation of the statute. For example, a rate upon a commodity may be increased by changing its classification. When the classification of an article is so used by a carrier, it is the duty of the Commission to revise the classification so that the abuse may be corrected. This power of the Commission extends to joint as well as individual classifications.<sup>2</sup>

1. *In re Western Classification*, 25 I. C. C. 442.

2. *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. Ed. 995; 27 Sup. Ct. 648. The Court said: "This brings us to the final contention made on behalf of the railway companies, viz., that the order of the Commission was not lawful, because not within the power conferred by the act of Congress. This is, we think, largely disposed of by what we have previously said as to the nature and scope of the investigation which the Commission was authorized to make and the redress

which it was empowered to give irrespective of the particular character of the complaint by which its power may have been previously invoked. Whatever might be the rule by which to determine whether an order of the Commission was too general where the case with which the order dealt involved simply a discrimination as against an individual or a discrimination or preference in favor of or against an individual or a specific commodity or commodities or localities, or as applied to territory subject to different classifications, and we think it is clear that the order made

**§ 223. Controlling Considerations in Making Classifications of Freight.** Many rules have been recognized and adopted by the Commission in the classification of freight for shipment. "Some of the rules, and in fact most of them, testified to by the witnesses in this case," said the Commission in an early case,<sup>3</sup> "in regard to the controlling considerations in the making of classifications of freight, are such as have been recognized by the Commission. For example, that a reasonable, fair and just difference may be made in proportion to quantity hauled of the same article in a full carload and in less than carload lots, and the respective rates charged upon each according to weight, is a principle that has been often recognized by the Commission. That a rate maker may and in fact should take into consideration, as shown by the evidence in this case, such controlling conditions, in preparing a classification, as bulk and space occupied, the weight of the article as compared with its dimensions, its value, whether it can be so loaded into a car as to make a full carload, and whether as a matter of fact it is hauled in carloads as well as in less than carloads, are each and all true. But the mere fact that one article, for example, sewing machines, is shipped 'in greater quantities' than surgical chairs, when each as a rule is shipped in less than carload quantities, and of no large difference in bulk, weight and value, and of no appreciable difference in expense of handling and of hauling, that this alone should constitute in itself any reason why the former should enjoy

in this case was within the competency of the Commission, in view of the nature and character of the wrong found to have been committed and the redress which that wrong necessitated. Finding, as the Commission did, that the classification by percentage of common soap in less than carload lots operating throughout Official Classification territory, brought about a general disturbance of the relations previously existing in that

territory, and created discriminations and preferences among manufactures and shippers of the commodity and between localities in such territory, we think the Commission was clearly within the authority conferred by the act to regular commerce in directing the carriers to cease and desist from further enforcing the classification operating such results."

3. *Harvard Co. v. Pennsylvania Co.*, 3 I. C. R. 257, 4 I. C. C. 212.

lower rates or classification than the latter, merely for the reason that they are shipped 'in greater quantities,' is a doctrine to which we cannot give our assent. In such a case mere quantity, not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling and carriage, cannot be allowed to affect rates in the transportation of property. The small dealer is entitled to just and reasonable rates on his product, as much so as many and large dealers, and any discrimination between them in rates based upon the idea that the one class of persons makes many shipments while the other makes but few is unjust and unreasonable under the provisions of the Act to Regulate Commerce. It is a discrimination in favor of one kind of traffic as against another in the vital matter of rates, and is unlawful."

**§ 224. Discriminations and Preferences in the Classification of Commodities.** Freight classification is based upon the relationship which commodities bear to each other in such respects as character, use, bulk, weight, value, tonnage or volume, risk, cost of carriage, ease of handling, and controlling conditions caused by competition.<sup>4</sup> But the classification of property must be based upon a real distinction from a transportation standpoint.<sup>5</sup> Competition may be taken into consideration in classifying freight within proper limitations not only between carriers but also between commodities

4. *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648; *Fels & Co. v. Pennsylvania R. Co.*, 23 I. C. C. 483, 25 I. C. C. 154; *Forest City Freight Bureau v. Ann Arbor R. Co.*, 18 I. C. C. 205; *Metropolitan Paving Brick Co. v. Ann Arbor R. Co.*, 17 I. C. C. 197; *Proctor & Gamble Co. v. Cincinnati, H. & D. Ry. Co.*, 9 I. C. C. 440; *Myer v. Cleveland, C. C. & St. L. Ry. Co.*, 9 I. C. C.

78; *Page v. Delaware, L. & W. R. Co.*, 6 I. C. C. 548; *Coxe Bros. & Co. v. Lehigh Valley R. Co.*, 4 I. C. C. 535; *Harvard Co. v. Pennsylvania R. Co.*, 4 I. C. C. 212; *Warner v. New York Cent. & H. River R. Co.*, 4 I. C. C. 32; *Thurber v. New York Cent. & H. River R. Co.*, 3 I. C. C. 473; *Pyle & Sons v. East Tennessee, V. & G. R. Co.*, 1 I. C. C. 465.

5. *Stowe-Fuller Co. v. Pennsylvania Co.*, 12 I. C. C. 215.



produced in different sections of the country.<sup>6</sup> In determining what freight rates should be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which directly ignores all considerations of this kind or which directly fails to give due weight to such considerations, is unjust and unreasonable.<sup>7</sup>

Under the amendment of 1910 to Section 1 of the Act, it is made the duty of all common carriers subject to federal control to establish, observe and enforce just and reasonable classifications of property for transportation, and just and reasonable regulations and practices affecting classifications, and every unjust and unreasonable classification is prohibited and declared to be unlawful. At the same time Section 15 of the Act was so amended as to provide that if, after full hearing, the Commission should be of the opinion that any individual or joint classification is unjust, unreasonable, unjustly discriminatory or unduly preferential, it shall be authorized to determine and prescribe just, fair and reasonable individual or joint classifications, and to make an order that the carrier shall adopt the classifications so prescribed.

Even before the passage of this amendment, the Supreme Court had held that the Commission had the power, in the public interest, to consider the whole subject of classification and the operation thereof, so as to prohibit undue preferences and unjust discriminations.<sup>8</sup> In the last case cited, it appeared that the carriers advanced soap in carload lots from the sixth to the fifth class, and in less than carload lots from the fourth to the third class. Shortly thereafter less than carload rates on soap were again changed to twenty per cent less than third class but not less than fourth class. Proctor & Gamble Co. filed a complaint before the Commission because of this increase against several carriers in of-

6. *Metropolitan Paving Brick Co. v. Ana Arbor R. Co.*, 17 I. C. C. 197.

7. *Myer v. Cleveland, C. C. & St. L. Ry. Co.*, 9 I. C. C. 78.

8. *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, 51 L. Ed. 995, 27 Sup. Ct. 648.



ficial classification territory. The Commission held that since the carriers had voluntarily carried less than carload shipments of soap at fourth class rates for ten years previously, a presumption arose that such a classification was reasonable, and an order was entered requiring the carriers to cease and desist from enforcing the twenty per cent less than the third class rates on less than carload soap and from charging the complainant higher than fourth class rates upon shipments of that commodity. The carriers did not observe the order until the Supreme Court upheld the decision of the Commission.<sup>9</sup> Prior to the amendment of 1906 which gave the Commission power to prescribe the rate for the future, the Commission had nevertheless repeatedly asserted and exercised the power to order and change any classification.<sup>10</sup>

**§ 225. Differential Between Raw Material and Manufactured Products—Grain and Flour, Livestock and Meats, Etc.** There is no rule of law requiring carriers to fix the same rate on the manufactured product as on the raw material from which it is made;<sup>11</sup> but generally the manufactured products bear higher rates of transportation than the raw material because there is ordinarily a substantial difference between the value

9. *Proctor & Gamble Co. v. Cincinnati, H. & D. Ry. Co.*, 9 I. C. C. 440. See also *Fels & Co. v. Pennsylvania R. Co.*, 23 I. C. C. 483, 25 I. C. C. 154, in which it was held that less than carload shipments of soap should take fourth class rate and reparation was directed.

10. *Harvard Co. v. Pennsylvania Ry. Co.*, 2 I. C. C. 122, 2 I. C. R. 81; *Hurlburt v. Lake Shore & M. S. Ry. Co.*, 2 I. C. C. 122, 2 I. C. R. 81; *Reynolds v. Western New York & P. Ry. Co.*, 1 I. C. C. 393, 1 I. C. R. 685.

11. *Interstate Commerce Commission v. Chicago Great Western*

*R. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493; *In re Kansas-California Flour Rates*, 32 I. C. C. 602; *Stuarts Draft Milling Co. v. Southern Ry. Co.*, 31 I. C. C. 623; *In re Kansas-California Flour Rates*, 29 I. C. C. 459; *Arizona Corporation Commission v. Arizona & N. W. Ry. Co.*, 29 I. C. C. 424; *State of Iowa v. Atlantic Coast Line R. Co.*, 24 I. C. C. 134; *In re Grain Product Rates*, 21 I. C. C. 22; *Howard Mills Co. v. Missouri P. Ry. Co.*, 12 I. C. C. 258; *In re Corn and Corn Products*, 11 I. C. C. 212, 11 I. C. C. 220; *Board of R. R. Com'rs of Kansas v. Atchison, T. & S. F. Ry.*, 8 I. C. C. 304;

of the one and that of the other.<sup>12</sup> In one case the Supreme Court held that a higher rate for the shipment of livestock than for the transportation of packing-house products and dressed meats was not an unjust discrimination.<sup>13</sup>

There is no inflexible requirement that the rates upon grain and the products of grain should be, under all circumstances, the same, and the carriers may, in just regard to their own interests to meet special conditions, vary these rates within narrow limits.<sup>14</sup> Thus, in the case last cited, a rate of fifty-five cents per hundred pounds on wheat and a rate of sixty-five cents per hundred pounds on flour between points in Kansas and California was held to be discriminatory, but the Commission decided that a difference of seven cents would not be discriminatory.<sup>15</sup> At the same time the Commission held that the differential on corn meal shipped from Missouri River points to Texas destinations should not be more than three cents per hundred pounds above the rate on corn between the same points.<sup>16</sup> The Commission, in passing upon the relation between flour and grain rates in another case said.<sup>17</sup> "The question of proper relation of flour and grain rates is not new. We have heretofore considered it from many angles and with respect to various sections of the country and have always had regard for the situation existing in the particular territory involved and treated the question according to the special circumstances and conditions present in each case. That is to say,

Kauffman Milling Co. v. Missouri P. Ry. Co., 4 I. C. C. 417, 3 I. C. R. 400; Bates v. Pennsylvania R. Co., 3 I. C. C. 435, 2 I. C. R. 715.

12. Knight Woolen Mills v. Chicago & N. W. Ry. Co., 32 I. C. C. 490; In re advances Grain Rates in C. F. A. territory, 28 I. C. C. 549; In re advances Brooms to Colorado, 28 I. C. C. 310; McClung & Co. v. Southern Ry. Co., 23 I. C. C. 414; Electric Malting Co. v. Atchison, T. & S. F. Ry. Co., 23 I. C. C. 379; East St. Louis Cotton

Oil Co. v. St. Louis & S. F. R. Co., 20 I. C. C. 37.

13. Interstate Commerce Commission v. Chicago Great Western R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. 493.

14. Howard Mills Co. v. Missouri P. Ry. Co., 12 I. C. C. 258.

15. In re Corn and Corn Products, 11 I. C. C. 212.

16. In re Corn and Corn Products, 11 I. C. C. 220.

17. Stuarts Draft Milling Co. v. Southern Ry. Co., 31 I. C. C. 623.

we have not attempted to lay down any fixed rule to govern in all cases but have in some instances approved equal rates on flour and wheat, in others have upheld uniform spreads and in others varying spreads. The arguments made in the instant case are also familiar, suggesting the broad principle of the application of higher rates on manufactured products than on raw materials; the fact that flour is generally recognized to be more valuable than wheat, that it does not load so heavily, is subject to greater risk of loss and damage in transit, and has a wider general distribution; the maintenance by carriers in some localities of like or equal rates on all grain or grain products and the natural advantage to the mill located where the grain is produced."

**§ 226. Differential between Carload and Less than Carload Rates Lawful.** A lower rate for a carload than for less than a carload upon the same article even when transported over the same line, in the same direction and for the same distance does not constitute either an unjust discrimination or an undue preference.<sup>18</sup> But the difference between the two rates must be reasonable and should be determined primarily by the carrier with due regard to the just interest of all.<sup>19</sup> The difference in the rates embodies the assumption that the carload is the unit of shipment and rests upon the difference which exists between the cost of service in the case of a carload shipment by one consignor to one con-

18. *Duncan v. Atchison, T. & S. F. R. Co.*, 6 I. C. C. 85; *Thurber v. New York Cent. & H. River R. Co.*, 3 I. C. C. 473, 2 I. C. R. 742.

19. *Business Men's League of St. Louis v. Atchison, T. & S. F. R. Co.*, 9 I. C. C. 318; *Duncan v. Atchison, T. & S. F. R. Co.*, 6 I. C. C. 85, in which the Commission said: "The differences between the rates for carloads and less than carloads on the grocery articles in question in that case were under

the facts established by the testimony declared to be unreasonable. That testimony was voluminous and related, among other things, to the average cost of handling and loading the freight in carloads and less than carloads, respectively, and of its transportation, unloading and delivery; to the relative earnings from carloads and less than carloads; to the relative number and tonnage of carloads and less than carloads; to

signee and that occasioned by a shipment in one car of many packages by various consignors to various consignees.

The dissimilar conditions which exempt the application of the statute are the increased cost of loading, unloading, billing and collecting for several small shipments in one car. "Reasons that are substantial," said the Commission in another case,<sup>20</sup> "exist for making the rate lower per barrel in car load lots than in less than car load quantities. The cost of service is very considerably less in the case of shipments in car load lots than in less than car load quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the car load goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way bill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than car load quantities. There is but one collection of charges for freight. All of these reasons apply with the same force whether the shipment be in a tank or in barrel shipments in car load lots.

"Where the shipment is made in less than car load quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the way bill. The shipment is by a local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at

the movement of empty cars over the lines of the carriers complained against, and to the cost of many of the articles in question to the seaboard jobbers and the profit arising from the business. In the present cases there is no proof except as to the difference between the carload and less than carload rates. It is questionable

whether the difference in the cost of service and other conditions incident to the two modes of shipment is so great as to justify a rate on less than carloads more than twice as high as that on carloads."

20. *Scofield v. Lake Shore & M. S. R. Co.*, 2 I. C. C. 90, 2 I. C. R. 67.



each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a car load shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation. There is also a considerable element of danger attending the handling of barrel oil in small lots which are unloaded by the carrier and stand in the local station houses, whereas car load lots are usually unloaded by the consignee at a distance from the depot building and immediately removed from the premises of the railroad company. All these facts show that a reasonable difference can and should justly be made between shipments in car load lots and less than car load quantities.”

§ 227. **Relation Between Carload and Less Than Carload Rates Must Not Be Excessive.** Interstate carriers are required to establish a just relation between carload and less than carload rates in accordance with some consistent principle throughout the classification and the rate schedule which is constructed upon it. An excessive difference between the carload and less than carload rates on the same commodity results in an undue preference to the carload shipper.<sup>21</sup> The respective rates on carload and less than carloads must not be relatively unreasonable.<sup>22</sup> In *Business Men's League v. Atchison, T. & S. F. Ry. Co.*, cited in the notes, the Commission held that in the adjustment of carload and less than carload rates from the middle west to the Pacific Coast, a differential between the carload and less than carload of fifty per cent of the carload rate was *prima facie* excessive.

21. In *re Western Classification*, 25 I. C. C. 442; *Thurber v. New York Cent. & H. River R. Co.*, 3 I. C. C. 473.

22 *Business Men's League of*

*St. Louis v. Atchison, T. & S. F. Ry. Co.*, 9 I. C. C. 318; *Duncan v. Atchison, T. & S. F. Ry. Co.* 6 I. C. C. 85.

§ 228. **Application of Carload Rates to Carload Lots when Goods Belong to Several Owners.** Ownership cannot be a test as to the applicability of rates, for diversity of ownership does not differentiate the service the carrier gives. Unless there is a difference in the condition of carriage there can be no difference in charges under Section 2. The carrier deals with the shipment that is tendered, not with its ownership, or its ultimate use. It deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed.

The provisions of the statute aimed at discriminations and preferences do not permit a carrier to deny the use of a rate published by distinguishing between those offering shipments for transportation. When, therefore, similar packages belonging to several owners are bulked and offered for shipment in carload lots under one bill of lading from a single consignor to a single consignee, the carrier cannot legally charge a greater sum for the transportation than if the packages all belonged to one person.<sup>23</sup> The discrimination denounced by the statute refers to the character of the article shipped and the carriage, but not to the title of the goods. The cost of carrying a "bulked shipment" is not greater than when the same amount of freight is carried at the instance of a single owner.

The conflict indicated in the note between the decisions of the Interstate Commerce Commission and the lower federal courts was settled in a decisive opinion by the United States Supreme Court.<sup>24</sup> Chief Justice White, speaking for the Court, said: "The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods

23. *Export Shipping Co. v. Wabash R. Co.*, 14 I. C. C. 437; *California Commercial Association v. Wells, Fargo & Co.*, 14 I. C. C. 422; *Buckeye Buggy Co. v. Cleveland, C. C. & St. L. Ry. Co.*, 9 I. C. C. 620; *Contra: Delaware, L. & W. R. Co. v. Interstate Com-*

*merce Commission*, 166 Fed. 499; *Lundquist v. Grand Trunk Western Ry. Co.*, 121 Fed. 915.

24. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriers, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that as the section forbids a carrier from 'charging a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property, \* \* \* than it charges, demand, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions,' authority is to be implied for basing a charge for transportation upon ownership or non-ownership of the goods tendered for carriage, upon the theory that such ownership or non-ownership is a dissimilar circumstance and condition within the meaning of the section. But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of

the contention is demonstrated by authority. It is not open to question that the provisions of Section 2 of the act to regulate commerce was substantially taken from Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co. v. Sutton*, 1869—L. R. 4 H. L. 226; *Evershed v. London & N. W. Ry. Co.*, 1878—3 App. Cas. 1029, and *Denaby Main Colliery Co. v. Manchester, etc., Ry. Co.*, 1885—11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, certainly to the extent that its interpretation is involved in the matter before us. *Wight v. United States*, 167 U. S. 512; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S. 144, 166."

**§ 229. Wheat and Coarse Grain Not "Like Traffic" Requiring Same Rate.** If inequality results from the exaction of a special rate from one shipper and a different rate from another, upon like traffic contemporaneously transported under similar circumstances, the law is violated. However, it has been held, that wheat, on the one hand, and rye, oats and other coarse grain, on the other, do not constitute "like traffic" within the meaning of the statute so that a different charge for their contemporaneous transportation is not violative of Section 2. A proportional rate, therefore, on wheat



from Minneapolis and Duluth, Minn., to Chicago is not unjustly discriminatory because a higher rate obtains on coarse grains between the same points.<sup>25</sup> But the Commission held that all-rail rate on wheat from Minneapolis to New York in excess of rates contemporaneously applicable on flour between the same points subjected a mill owner at Lockport in New York to an undue prejudice.<sup>26</sup>

**§ 230. Different Uses to which Commodity is Put, No Justification For Different Rates.** Interstate carriers by railroad and all other common carriers subject to federal control are prohibited from basing a rate for transportation upon the consideration of the use to which the commodity is put. Tariffs, therefore, which provide for higher rates on the same commodity, when based upon the different uses made of the commodity after the transportation is completed, are illegal.<sup>27</sup> For example, higher rates on coke for foundries than for furnaces were condemned by the Commission.<sup>28</sup> In another case, it appeared that a carrier concurrently maintained two rates upon nitrate of soda, one when for use as a fertilizer and another without restriction as to use. The practice of thus differentiating rates was con-

25. Board of Trade of Chicago v. Chicago & A. R. Co., 27 I. C. C. 530.

26. Federal Milling Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 27 I. C. C. 696.

27. In re advances paper from Manitowoc, etc., 28 I. C. C. 305; Wisconsin Steel Co. v. Pittsburgh & L. E. R. R., 27 I. C. C. 152; Coke Producers' Ass'n of Connellsville region v. Baltimore & O. R. R., 27 I. C. C. 125; Arkansas Fertilizer Co. v. St. Louis, I. M. & S. Ry., 25 I. C. C. 645; St. Louis Blast Furnace Co v. Louisville & N. R. R., 25 I. C. C. 545; Virginia-Carolina Chemical Co. v. Atlantic Coast Line R. R., 22 I. C. C. 394;

Carter White Lead Co. v. Norfolk & W. Ry., 21 I. C. C. 41; In e Restricted Rates, 20 I. C. C. 426; Anaconda Copper Min. Co. v. Chicago & E. R. R., 19 I. C. C. 592, 21 I. C. C. 41; Metropolitan Paving Brick Co. v. Ann Arbor R. R., 17 I. C. C. 197; Sligo Iron Store Co. v. Atchison, T. & S. F. Ry., 17 I. C. C. 139; Douglas & Co. v. Chicago, R. I. & P. Ry., 16 I. C. C. 232; Stowe-Fuller Co. v. Pennsylvania Co., 12 I. C. C. 215; Capital City Gas Co. v. Central V. Ry., 11 I. C. C. 104.

28. Coke Producers' Ass'n of Connellsville Region v. Baltimore & O. R. R., 27 I. C. C. 125.

demned.<sup>29</sup> But a different rate on "smithing" coal than on ordinary bituminous coal, is proper as there is a real difference in the value of the commodities transported.<sup>30</sup>

§ 231. **Justifiable Discrimination Between Shipments of Oil in Barrels and in Tank Cars.** When a common carrier transported oil in barrels and also in tank cars and the use of the tank cars was limited to a certain class of shippers, the Commission held, in an early case,<sup>31</sup> that a charge for the barrel package in barrel shipments and a failure to charge likewise for the tank shipments, resulting in increasing the cost of transporting oil by barrels, on like quantities of oil, was an unjust discrimination. But the United States Supreme Court, on appeal in the same case, held that there was no preference or discrimination in charging a higher rate for the barrel shipments than for shipments in tank cars. It appeared, however, in this case that the shippers had made no demand for tank cars and could not have used them in any event on account of not having facilities for unloading the oil at destination points.<sup>32</sup>

§ 232. **Relationship of Rates on Lumber and Lumber Products Must be Free From Discrimination.** When the same rate is applied to lumber and lumber products in one territory, carriers are guilty of unjust discrimination in maintaining and charging a differential in the rates on these respective classes of traffic in another territory unless the difference in treatment of the same products in different territories is clearly established. In other words, carriers should effect uniformity in treatment in the classification of lumber and lumber prod-

29. *Fort Smith Traffic Bureau v. St. Louis & S. F. R. R.*, 13 I. C. C. 651.

30. *Sligo Iron Store Co. v. Union P. R. R.*, 19 I. C. C. 527; *Sligo Iron Store Co. v. Atchison, T. & S. F. Ry.*, 17 I. C. C. 139.

31. *Independent Refiners' Ass'n v. Western New York & P. R. Co.*, 4 I. C. R. 162, 5 I. C. C. 416.

32. *Penn Refining Co. v. Western New York & P. R. Co.*, 208 U. S. 208, 52 L. Ed. 456, 28 Sup. Ct. 268.

ucts throughout the country.<sup>33</sup> In the case cited, complainants, manufacturers of sash and doors, located in Wisconsin, Iowa and Illinois, contended that the relation of sash and door rates to lumber rates should be the same upon the movements of either products to points in central freight association and trunk line territories as the relationship of such rates from the mills of their competitors on the Pacific Coast, and that the lack of uniformity in the relationship caused unlawful discrimination and preference. It appeared that the complainants paid rates on their products which were higher than the rate on lumber, while the Pacific Coast manufacturers paid rates on their products which were the same as the rates on lumber. The Commission held that the charge of unjust discrimination in so far as the discrimination arose from the unequal treatment of lumber and lumber products, especially sash and doors, in the competing territories, had been established.

**§ 233. Differentials Between Similar Commodities Justified by Different Conditions and Circumstances Affecting Transportation—Lumber and Logs.** A differential between similar commodities is often justifiable because of the different circumstances and conditions affecting the transportation of the commodities. For example, the Commission found that a higher rate on poles and piling than on lumber, from Portland, Or., to San Francisco, was not discriminatory.<sup>34</sup> Such higher rates were upheld because it appeared that poles and piling could only be loaded on one kind of equipment, flat cars; that such a condition necessitated a large north-bound movement of empty cars whereas lumber could be loaded on practically every kind of a car; that lumber loads were heavier than piling and that because of heavy grades and sharp curves, loads of poles and piling shift and require readjustment, thereby causing

33. *Anson, Gilkey & Hurd Co. v. Southern P. Co.*, 33 I. C. C. 332.

in which the Commission reversed its former opinion reported in 22

34. *California Pole & Piling Co. v. Southern P. Co.*, 27 I. C. C. 669,

I. C. C. 507.

additional expense for inspection and labor which did not obtain to the same extent upon cars of lumber.

**§ 234. Lower Rates on Returned Shipments Illegal Except When Refused by Consignees.** Under the accepted interpretation of Section 2 of the Interstate Commerce Act, a carrier subject to federal control, is forbidden to make a difference in charge for services rendered contemporaneously and under like conditions of carriage. The transportation, for instance, of a consignment of goods from St. Louis to Chicago does not differ in any respect from the transportation of another lot of similar freight between the same points simply because the latter consignment had been previously shipped from Chicago to St. Louis. The circumstances and conditions attending the two shipments are identical. Hence, there can ordinarily be no justification for a lower rate on return shipments; for the fact that freight has been shipped once and paid one rate, should not be taken into consideration in fixing charges for a distinct and subsequent transaction or shipment of the same freight, whether the transportation be backward or forward.<sup>35</sup> The Commission has, therefore, repeatedly condemned lower rates on return shipments as being discriminatory except in cases where the freight has been refused by the consignee. In the latter case, the return movement is essentially a continuation of the going movement and may therefore be accorded lower than standard rates. A provision in the tariffs that goods shipped in closed packages may enjoy return-shipment rates if tendered to the carrier by the consignees within ten days, has been approved. The Commission considered this provision a slight departure from the legal theory involved,

35. *Alabama & V. Ry. Co. v. Mississippi R. R. Commission*, 203 U. S. 496, 51 L. Ed. 289, 27 Sup. Ct. 163; *Bigbee & Warrior Rivers Packet Co. v. Mobile & O. R. Co.*, 60 Fed. 545; *Cannon Falls*

*Farmers' Elevator Co. v. Chicago G. W. Ry. Co.*, 10 I. C. C. 650; *James & Abbott v. East Tennessee, V. & G. Ry. Co.*, 3 I. C. C. 225, 2 I. C. R. 604.



but deemed it essential so that the rule applying lower rates on refused consignments, might be workable in practice.<sup>36</sup>

36. Red River Oil Co. v. Texas & N. W. Ry., 23 I. C. C. 432; In re  
& P. Ry. Co., 23 I. C. C. 438; Min- Returned Shipments, 19 I. C. S.  
neapolis Traffic Ass'n v. Chicago 409.

## CHAPTER XII

### UNJUST DISCRIMINATION AND UNLAWFUL PREFERENCE IN PASSENGER SERVICE

- Sec. 235. Federal Statute Includes Passenger as Well as Freight Transportation.
- Sec. 236. Carrying Personal Baggage of Passengers Free Not Undue Discrimination.
- Sec. 237. Collection of Additional Fare on Trains From Passengers Without Tickets not Unlawful.
- Sec. 238. Discrimination Between White and Colored Passengers Unlawful.
- Sec. 239. Lower Rates to Settlers Unlawful.
- Sec. 240. Control of Commission over Preference in Mileage, Excursion and Commutation Passenger Tickets.
- Sec. 241. Legality of Sale of Tickets for Number of Persons at Less Rate Than for a Single Passenger—Party Rate Case.
- Sec. 242. But Party Rate Tickets Cannot be Limited to Particular Classes of Persons.
- Sec. 243. Distinction Between Wholesale Rates in Passenger and Freight Traffic.
- Sec. 244. Regulations Governing Commutation Tickets Must Not be Discriminative Between Classes of Persons.
- Sec. 245. Discrimination in Trans-Continental Passenger Fares as Affecting Intermediate Localities.

**§ 235. Federal Statute Includes Passenger as Well as Freight Transportation.** The words of the Act “any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad,” etc., clearly indicate that a common carrier engaged in the interstate transportation of either and not necessarily of both, is subject thereto.<sup>1</sup> The statute prohibiting unjust discriminations and undue preferences, therefore, applies to the transportation of passengers in interstate commerce as well as to freight traffic.<sup>2</sup>

1. *Louisville & N. R. Co. v. Motley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 191 Fed. 40; *West End Improvement Club v. Omaha & C. B. Rail-*

*way & Bridge Co.*, 17 I. C. C. 239; *Ligon v. St. Louis & S. F. R. Co.*, 184 Mo. App. 187, 168 S. W. 647.

2. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Interstate Commerce*

**§ 236. Carrying Personal Baggage of Passengers Free Not Undue Discrimination.** The Interstate Commerce Act does not forbid all discriminations, but only those which are undue. Such discrimination therefore as may be involved in the carrying of personal baggage of a passenger without extra charge is not undue and the practice is therefore lawful.<sup>3</sup> In the case cited, it appeared that the complainant was a manufacturer who sent out traveling salesmen carrying sample trunks weighing about 1250 pounds. The railroad company treated these trunks as baggage, deducted 150 pounds and collected an excess charge for the balance. It was contended that it was illegal for the carrier to accord free transportation for any amount of baggage for the reason that if the carrier charged for all baggage transported, the rates on excess baggage could thereby be reduced, but the Commission held that there was nothing illegal in the free transportation of a certain amount of personal baggage.

**§ 237. Collection of Additional Fare on Trains From Passengers Without Tickets not Unlawful.** In the absence of a prohibiting statute, a carrier may lawfully prescribe and enforce a rule requiring passengers who have the opportunity and who neglect to purchase tickets at stations before embarking on trains, to pay additional fare on the trains if proper conveniences and facilities are furnished them for procuring tickets.<sup>4</sup> A regulation, therefore, in a passenger tariff requiring con-

Commission v. Baltimore & O. R. Co., 43 Fed. 37; In re Regulation Governing Sale of Commutation Tickets, 17 I. C. C. 144; Hewins v. New York, N. H. & H. R. Co., 10 I. C. C. 221; Cist v. Michigan Cent. R. Co., 10 I. C. C. 217; Elvey v. Illinois Cent. R. Co., 2 I. C. R. 804, 3 I. C. C. 652; Heard v. Georgia R. Co., 1 I. C. R. 719, 1 I. C. C. 428.

3. Herbeck-Demer Co. v. Baltimore & O. R. Co., 17 I. C. C. 88.

4. Georgia. Phillips v. Southern Ry. Co., 114 Ga. 284, 40 S. E. 268; Coyle v. Southern Ry. Co., 112 Ga. 121, 37 S. E. 163; Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352; Georgia Southern & F. R. Co. v. Asmore, 88 Ga. 529, 16 L. R. A. 53, 15 S. E. 13.

Indiana. Sage v. Evansville & T. H. R. Co., 134 Ind. 100, 33 N. E. 771; Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413, 30 N. E. 1106.

ductors to collect fares on trains from passengers without tickets by adding twenty-five cents to single trip rates, was held to be non-discriminatory as to a passenger who was compelled to pay.<sup>5</sup>

**§ 238. Discrimination Between White and Colored Passengers Unlawful.** The right of a carrier to segregate white and colored passengers has been established by the controlling decisions of the United States Supreme Court.<sup>6</sup> The separation, therefore, of white and colored passengers paying the same fare is not unlawful if cars and accommodations equal in all respects are furnished to both and the same care and protection of passengers is observed.<sup>7</sup> If a railroad company provides certain facilities and accommodations for the first-class passengers of the white race, like accommodations must be provided for colored passengers of the same class.<sup>8</sup>

**§ 239. Lower Rates to Settlers Unlawful.** In the transportation of passengers' carriers are performing a public duty and are subject to the rules of law which require absolute impartiality to all, when the circumstances and conditions are substantially the same. The fact that their own interests may be promoted to some

**Maine.** *State v. Goold*, 53 Maine, 279.

**Missouri.** *Cross v. Kansas City, Ft. S. & M. Ry. Co.*, 56 Mo. App. 664.

**Mississippi.** *Rivers v. Kansas City, M. & B. R. Co.*, 86 Miss. 571, 38 So. 508.

**North Carolina.** *Ammons v. Southern R. Co.*, 138 N. C. 555, 3 Ann. Cas. 886, 51 S. E. 127, 140 N. C. 196, 52 S. E. 731.

**Texas.** *Mills v. Missouri, K. & T. Ry. Co. of Texas*, 94 Tex. 242, 55 L. R. A. 497, 59 S. W. 874.

**Vermont.** *Stephen v. Smith*, 29 Vt. 160.

5. *Sidman v. Richmond & D. R. Co.*, 2 I. C. R. 766, 3 I. C. C. 512.

6. *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 59 L. Ed. 169, 35 Sup. Ct. 69; *Chesapeake & O. R. Co. v. Com.*, 179 U. S. 388, 45 L. Ed. 244; 21 Sup. Ct. 101; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256, 16 Sup. Ct. 1138; *Louisville, N. O. & T. Ry. Co. v. State*, 133 U. S. 587, 33 L. Ed. 784, 10 Sup. Ct. 348; *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547.

7. *Gaines v. Seaboard Air Line Ry. Co.*, 16 I. C. C. 491; *Cozart v. Southern Ry. Co.*, 16 I. C. C. 226; *Heard v. Georgia R. Co.*, 1 I. C. C. 428, 1 I. C. R. 719.

8. *Edwards v. Nashville, C. & St. L. Ry. Co.*, 12 I. C. C. 247.



extent by swerving from this rule cannot be regarded as sufficient to warrant a departure from the obvious language of the state. In enforcing this principle, the Interstate Commerce Commission held that a carrier had no right to sell tickets to prospective settlers near its lines at rates lower than tickets were sold to the general public between the same points.<sup>9</sup> But in another case, the Commission held that there was nothing illegal in the action of a railroad company in granting lower rates to immigrants riding in immigrant cars and declining to give the same rates to other passengers for whom different cars and trains were furnished.<sup>10</sup> Said the Commission:

“In the case before us we have a class of persons readily distinguishable from the general public and so far constituting a special class that up to the time when they are received upon the cars they are subject to exceptional regulations for reasons which, being accepted as a basis of legislation, must be deemed sufficient. This special class of persons are given accommodations essentially different to those provided for others, in cars specially set apart for their use, and which are commonly made up into trains by themselves and returned to the seaboard empty. The service is thus seen to be special, and the rates charged correspond to it. We cannot say that under such circumstances the classing them by themselves on the rate sheets is either illegal or wrongful.”

**§ 240. Control of Commission over Preference in Mileage, Excursion and Commutation Passenger Tickets.** While Section 22 of the Interstate Commerce Act provides that nothing in the statute shall prevent the issuance of mileage, excursion or commutation passenger tickets, the Commission has nevertheless control over such fares. If any element of discrimination is involved in the construction of commutation fares or any pref-

9. *Smith v. Northern P. Ry. Co.*, Cent. & H. River R. Co., 2 I. C. C. 1 I. C. C. 208. 338, 2 I. C. R. 210.

10. *Savery & Co. v. New York*

erences result from them as between individuals or localities, the Commission has the power to intervene to redress the wrong.<sup>11</sup> For example, the issuance of 1,000 mile tickets to commercial travelers at Twenty Dollars while at the same time the public was required to pay Twenty-five Dollars was held to be an unjust discrimination, as commercial travelers were not a privileged class, and a rate reasonable for them was also reasonable for others to pay.<sup>12</sup> But where railroad companies voluntarily established special excursion rates from points in California to the national convention of two political parties in Minneapolis and Chicago not limited to the delegates but open to the general public, it was held that the same carriers were not guilty of undue preference in withholding open excursion rates to Omaha where a convention of a third national party was held a month later.<sup>13</sup>

**§ 241. Legality of Sale of Tickets for Number of Persons at Less Rate Than for a Single Passenger—Party Rate Case.** An unjust discrimination within the meaning of the statute is practiced when the carrier charges or receives directly from one person a greater or less compensation than from another, or accomplishes the same thing indirectly by means of a special rate, rebate or other device; but, in either case, it must be for a like and contemporaneous service in the transportation of a like kind of traffic under substantially same circumstances and conditions.

In one of the early complaints before the Commission, it developed that the Baltimore and Ohio Railroad Company sold "party rate tickets" whereby parties of ten or more persons traveling together on one ticket were transported over its lines at two cents per mile per capita when single passengers traveling over its road for the same distance, were required to pay three cents

11. *In re Commutation Rate of St. Louis v. Missouri P. Ry. Case*, 21 I. C. C. 428.      Co., 1 I. C. C. 156, 1 I. C. R. 393.

12. *Larrison v. Chicago & G. T. Ry. Co.*, 1 I. C. C. 147, 1 I. C. R.      13. *Cator v. Southern P. Co.*, 6 I. C. C. 113, 4 I. C. R. 497.

369. See also *Associated Grocers*

per mile. The railroad company, before the Commission, contended that it was lawful to make a charge per capita for persons traveling on party rate tickets lower than the charge for a single passenger making one trip between the same points because the character, circumstances and conditions of the service were substantially different, and the making of such a lower charge for parties of ten or more subjected no person to any undue or unreasonable preference or advantage. The evidence disclosed that the party rate tickets were used principally by theatrical companies but the carrier offered the same rates on the same terms to the public at large. The Commission, however, held that the sale of party tickets for rates lower than contemporaneous rates for single passengers was illegal.<sup>14</sup> But on an appeal from the order of the Commission, the Circuit Court and the national Supreme Court decided that the practice did not constitute an illegal discrimination or an undue preference for the reason that there was not a substantial identity of circumstances and of services accompanied by a partiality resulting in an undue advantage to one or an undue prejudice to the other.<sup>15</sup> "These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage," said the Court, "the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway

14. *Pittsburg, C. & St. L. Ry. v. Baltimore & O. R. R.*, 3 I. C. C. 465, 2 I. C. R. 729.

15. *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844; *Interstate Commerce Co.*, 43 Fed. 37, in which Judge Jackson said: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same

circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."



makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market. The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago and St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the same amount of business done by means of these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing. If a case were presented upon the ground that it



was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage."<sup>16</sup>

**§ 242. But Party Rate Tickets Cannot be Limited to Particular Classes of Persons.** After the decision of the United States Supreme Court holding that the sale of party rate tickets did not constitute a discrimination in violation of the statute, many railroads filed tariffs limiting the party rates to particular classes of persons such as theatrical, concert, baseball and other like organizations traveling together on one party ticket for the purpose of giving public entertainments. Such a limitation on the issuance of party tickets was held to be an unjust discrimination under the statute; for there can be no dissimilarity or justification in charging more in transporting a party of ten persons belonging to an amusement company than for transporting the same number of persons of any occupation when carried in the same car, at the same time and between the same points.<sup>17</sup> In another case a carrier permitting the use of party rate tickets to amusement companies was found guilty of unjust discrimination when it refused to transport a party of detectives under the same arrangements.<sup>18</sup>

**§ 243. Distinction Between Wholesale Rates in Passenger and Freight Traffic.** The United States Supreme Court in the Party Rate case very carefully pointed out the distinction between wholesale rates in passenger tickets and in freight. Discriminations based solely on the amount of freight shipped by two shippers under similar conditions are illegal; for it would enable the large and favored shipper to sell his goods at a lower price than his competitor and thus enable him to ob-

16. *Koch Secret Service v. Louisville & N. R. R.*, 13 I. C. C. 523; *Field v. Southern Ry.*, 13 I. C. C. 298.

17. *In re Party Rate Tickets*, 12 I. C. C. 95.

18. *Koch Secret Service v. Louisville & N. R. Co.*, 13 I. C. C. 523.

tain a comparative monopoly.<sup>19</sup> That one man is a large shipper, and another a small one, will not justify the carrier in making a difference in freight rates if the commodity is of a like kind and is shipped under similar circumstances.<sup>20</sup>

The fluctuating views of the courts on this question disappeared to a large degree after the strong and forceful opinion of the Commission in *Providence Coal Co. v. Providence & W. R. Co.*,<sup>21</sup> in which Commissioner Cooley said: "But when a question of rebates or discounts is under consideration, it might be misleading to consider them in the light of the principles which merchants act upon in the case of wholesale and retail transactions. There is a very manifest difficulty in applying those principles to the conveniences which common carriers furnish to the public, a difficulty which springs from the nature of the duty which such carriers owe to the public. That duty is one of entire partiality of service. The merchant is under no corresponding duty, and may make his rules to suit his own interest, and discriminate as he pleases. There is no occasion to enlarge upon this now. A discrimination such as the offer and its acceptance by one or more dealers would create, must have a necessary tendency to destroy the business of small dealers. Under the evidence in the case it appears almost certain that this destruction must result, the margin for profit on wholesale dealings in coal being very small. The discrimination is therefore necessarily unjust within the meaning of the law. It cannot be supported by the circumstance that the offer is open to all; for although made to all, it is not possible that all should accept. Moreover, in testing such a discrimination we must consider the principle by which it must be supported; and the principle which would support a 30,000 ton limitation would

19. *Rickards v. Atlantic Coast Line R. Co.*, 23 I. C. C. 239; *Anaconda Copper Min. Co. v. Chicago & E. R. R.*, 19 I. C. C. 592; *Carstens Packing Co. v. Oregon Short Line R. Co.*, 17 I. C. C. 324; *Scot-*

*field v. Lake Shore & M. S. Ry.*, 2 I. C. C. 90, 2 I. C. R. 67.

20. *United States v. Tozer*, 39 Fed. 369; *Kinsley v. Buffalo, N. Y. & P. R. Co.*, 37 Fed. 181.

21. 1 I. C. C. 107, 1 I. C. R. 363.

support one of 50,000 or 100,000 equally well; the quantity named would be arbitrary in any case. It might easily be so high as practicably to be open to the largest dealer only. A railroad company, if allowed to do so, might in this way hand over the whole trade on its road in some necessary article of commerce to a single dealer; for it might at will make the discount equal to or greater than the ordinary profit in the trade; and competition by those who could not get the discount would obviously be taken out of the question. So extreme a case would not, however, be needful to show the inadmissibility of such a discount as is here offered; the injustice would be equally manifest if several dealers instead of one were able to accept the offer. A railroad company has no right, by any discrimination not grounded in reason, to put any single dealer, whether a large dealer or a small dealer, to any such destructive disadvantage. In what is said about this we do not mean to be understood as intimating that the defendant is not saved something in cost and in labor by having the coal carried by it received in large quantities by single consignees. On the contrary, we readily agree that its service for large dealers is somewhat less in proportion to quantity of freight transported than is the like service performed for small dealers. We also agree that defendant may therefore seem to have an interest in restricting its dealings so far as possible to large dealers. But this is an interest that can only be consulted and acted upon in strict subordination to the rules of law; and one of the most important of those rules is that in any discrimination between dealers justice, if not a paramount consideration, shall at least be kept in view. The carrier cannot regard its own interests exclusively—if it could, it might at pleasure, by methods easily available, drive all small dealers off its line, and center the whole trade in a few hands. The state of things that would result might be altogether for its interest and convenience, since it would then have fewer customers to deal with and fewer transactions for the same aggregate trade; but the wrong would be flagrant. The case suggested is more extreme than the one before us, but the



wrong is sufficiently palpable here. And without further comment on this branch of the case it will be sufficient to repeat that when the defendant makes an offer of discount or rebate based on the 30,000 ton limit, the limitation is unreasonable and unlawful, because necessarily resulting in unjust discrimination. There is nothing in the showing in this case to justify the fixing of a limitation as the ground of rebate at any specified quantity; and therefore if the discount is paid to one dealer, the payment will be evidence of the right of all other dealers to a like and proportionate discount."

**§ 244. Regulations Governing Commutation Tickets Must Not be Discriminative Between Classes of Persons.**

Carriers subject to the statute have no right to fix different rates for the transportation of persons over the same line, between the same points under substantially similar circumstances and conditions. An arrangement, therefore, by which a railroad company offers monthly commutation tickets to pupils who attend schools of a certain kind or class and specifically excludes pupils attending various other kinds of schools from the benefit thereof, is unjustly discriminatory.

But carriers may lawfully offer and sell commutation tickets to all children or young persons between certain stated ages. Such a regulation will provide desired rates for school pupils and will not exclude other children traveling under substantially similar conditions for the purpose of securing other lines of instruction, or on other missions. It will also protect against the use of such tickets by adults. A railroad company has no right to inquire into the mission, errand or business of a passenger as a condition for fixing the transportation rate which such passenger shall pay.<sup>22</sup>

**§ 245. Discrimination in Trans-Continental Passenger Fares as Affecting Intermediate Localities.** Passenger fare adjustments over different routes between important cities and localities may not only operate to

22. In re Regulations Governing Sale of Commutation Tickets to School Children, 17 I. C. C. 144.



the prejudice of passengers but may also unduly prejudice intermediate communities and localities between the two points when liberal stop-over privileges are accorded. Thus, in *Public Service Commission of Washington and others vs the Trans-Continental Carriers*,<sup>23</sup> it appeared in evidence that there were three different routes between Chicago, Ill. and San Francisco, the northern through Seattle and Portland, the central through Ogden and the southern through El Paso and New Orleans. The all-year excursion fare on the southern route was \$110 for the round trip and over the northern route, \$128 for the round trip.

A similar differential between the two routes was found to exist in summer tourist excursion fares. The complainants, representing cities and communities in the states of Oregon and Washington, urged that the higher fares on the northern route operated to the undue prejudice and disadvantage of localities served by the northern carriers in Washington and Oregon, and that the lower fares available to travelers on the central and southern routes gave an undue preference and advantage to localities served by the carriers participating in those routes. Upon a consideration of all the facts, the Commission held that both the all-year excursion passenger fare and the summer tourist excursion fares from Chicago to San Francisco applicable in either direction by way of Seattle, Wash., or Portland, Or., to the extent that they exceeded the corresponding fares in effect in either direction by New Orleans and El Paso, were unduly prejudicial to the localities served by the northern carriers.

23. *Public Service Commission of Washington v. Alabama & Vicksburg Ry. Co.*, 42 I. C. C. 54.

## CHAPTER XIII.

### FILING AND PUBLICATION OF INTERSTATE RATES, AND EFFECT THEREOF

- Sec. 246. Publicity and Permanency of Rates and Charges of Common Carriers at Common Law.
- Sec. 247. Publication, Certainty and Stability of Rates Necessary to Eliminate Rebates and Discriminations.
- Sec. 248. The Act to Regulate Commerce on Publicity of Rates and Adherence Thereto.
- Sec. 249. Purpose of Congress in the Passage of the Provisions of Section 6 of the Act.
- Sec. 250. Publication and Filing of all Rates, Fares and Charges for Interstate Transportation Mandatory.
- Sec. 251. Necessary Steps to Put Rates Legally in Force—Posting not Essential.
- Sec. 252. What the Schedules of Rates, Fares and Charges Filed with the Commission Must Contain.
- Sec. 253. Privileges or Facilities Furnished Shippers and Not Specified in Tariffs Unlawful.
- Sec. 254. Regulations Concerning Baggage of Interstate Passengers Must be Published.
- Sec. 255. Demurrage Charges on Interstate Shipments Must be Filed with Commission.
- Sec. 256. No Charges in Rates, Fares and Charges Permitted Without Thirty Days Notice to the Commission.
- Sec. 257. Carriers Prohibited from Departing to any Extent from Published Schedules of Rates and Charges Filed with Commission.
- Sec. 258. Foregoing Rule Equally Applicable to Transit and Special Services Provided in Tariffs.
- Sec. 259. Forwarders are Shippers within Statute Prohibiting Refunds from Published Rates and Charges.
- Sec. 260. Oral Contracts or Special Arrangements for Interstate Transportation Contravening Published Schedules Unlawful.
- Sec. 261. Shippers and Passengers Conclusively Presumed to Have Knowledge of Published Schedules of Rates, Fares and Charges.
- Sec. 262. Courts Bound by Published Rates and Charges Until Set Aside by Commission.
- Sec. 263. Carriers Must Collect the Scheduled Rates and Charges for Interstate Transportation.
- Sec. 264. Illustrative Cases Wherein the Foregoing Rule was Applied and Enforced.
- Sec. 265. Defense of Estoppel to Actions Against Shippers for Undercharges.

- Sec. 266. Penalty for Making Erroneous Quotation of Rate When Shipper is Damaged Thereby.
- Sec. 267. In Actions to Collect Scheduled Rates Counterclaims for Damages to Goods Prohibited.
- Sec. 268. Damages Not Recoverable for Failure to Post Rates at Stations.
- Sec. 269. Rule Stated in Foregoing Paragraph Illustrated in Adjudicated Cases.
- Sec. 270. Shipper May Recover Damages for Collection of Rate in Excess of that Fixed by Schedule.
- Sec. 271. Nothing but Money May be Lawfully Received for Transportation of Either Passengers or Property.
- Sec. 272. Acceptance of Promissory Notes in Payment for Freight Charges Unlawful.
- Sec. 273. Separately Established Rates must be Published in Absence of Joint Rates over Through Route.
- Sec. 274. When Through Rate is Made up of Sum of Locals, Rates in Effect on Date of Shipments Apply.
- Sec. 275. Departure from Published Tariffs Permitted in Performance of Private Duties by Carriers.
- Sec. 276. Rates for Passage of Vehicles on Railroad Ferries Must be Filed.

§ 246. **Publicity and Permanency of Rates and Charges of Common Carriers at Common Law.** While at common law excessive rates and unjust discriminations between shippers under similar circumstances were prohibited, there were no requirements as to the publicity of rates and charges for transportation, and no method of enforcing any permanency and stability in rate schedules. A fixed standard of charge which all shippers could ascertain did not exist. Carriers, therefore, could change their rates of transportation at pleasure and without public notification. The obligation of publicity and stability in rates was not recognized and the shippers were, therefore, without the proper means of judging whether the charges for railroad service were reasonable or just. Under this regime constant disturbances of rates were common and merchants were often unable to execute long-time contracts with any assurance as to what the rate would continue to be.

§ 247. **Publication, Certainty and Stability of Rates Necessary to Eliminate Rebates and Discriminations.** One of the chief objects of the Act to Regulate

Commerce was the suppression of discriminations and preferences between shippers and localities. Publicity of rates is a strong factor in the correction of the evils of unjust discriminations, extortion and unlawful preferences; for, by this means, a record, open to public inspection, may be kept of rates as they actually exist. A shipper can ascertain for himself what the rates are, and he can also determine what the cost of transportation will be to his competitor. A system of rates, open to all, and fixed and certain so that all shippers might ascertain from the tariff just what the rate is, is far more equitable than a system of special contracts and arrangements so prevalent before the Interstate Commerce Act was passed. A tariff filed and published which the carrier is required to adhere to and which cannot be changed without proper notice to the shipping public, is an effective, if not, in fact, the only method of securing transportation service to the public on equal terms.

Stability and permanency of rates are of the highest importance to every shipper because without advance knowledge of the rate, business contracts would possess too many elements of chance. In addition, the foundation of efficient regulation and supervision of rates rests in lawfully established and published charges. These factors in the correction of the evils of railroad transportation were recognized by the Cullom Committee in its report to Congress recommending the passage of the bill which later became the Interstate Commerce Act. The committee said:<sup>1</sup> "In the judgment of the committee one of the chief purposes of any legislation for the regulation of inter-State commerce should be to secure the fullest publicity, both as to the charges made by common carriers and as to the manner in which their business is conducted. The business of a common carrier concerns practically the whole public, and the carrier exercises in some respects a public function. The

1. Senate Report No. 46, 49th Congress, 1st Session, Part 1, Page 198.



people rightly feel that its charges should be public and open to all alike, and that they should be fully informed as to its financial condition, its methods of operation, and the net results of its business, to the end that an intelligent judgment may be formed as to whether the charges made, which are in the nature of a tax upon commerce and industry, are reasonable and equitably adjusted. They rightfully demand the opportunity to procure this information, and it is believed that the methods of regulation suggested by the committee in the accompanying bill will provide the means by which such information can best and most readily be obtained. It is agreed by all who have given the subject of railroad regulation attention that the maintenance of stable and reasonably uniform rates is of the first importance and greatly to be desired. Neither result, it is also agreed, can be secured without publicity, which is the surest and most effective preventive of unjust discrimination. Whenever rates are fluctuating and not alike to all, it is the rule that some portions of the commercial community obtain secret advantages over the remainder. When unjust discriminations are practiced by the carrier, success in business depends more upon favoritism (if nothing worse) than upon intelligence, integrity, and enterprise. The effect is demoralizing in the extreme. Business is conducted upon a false basis, false standards of commercial honor are erected, and a premium is offered to corruption. Worst of all, the advantages of unjust discrimination are, as a rule, enjoyed by those who least need outside aid, and the inevitable effect of this indefensible practice is to build up the larger dealer and crush out the smaller, to foster monopoly, and, in short, to encourage the existing tendency, already too strong, towards the concentration of capital and the control of commerce in the hands of the few."

**§ 248. The Act to Regulate Commerce on Publicity of Rates and Adherence Thereto.** The duties and obligations of carriers under federal control as to the printing, filing and publication of their rates, fares and charges for all transportation service within the terms of the

statute, together with the requirements as to the observance of the rates and charges so fixed, and the unlawfulness of any deviations therefrom, are set forth in Section 6 of the Act. The provisions contained therein, with the rights of shippers and the liabilities of carriers thereunder, will be discussed in this chapter. No section of the act has been more frequently amended than this one. The entire section was recast and rewritten in its passage as a part of the Hepburn Act of 1906. The decisions of the courts construing the provisions of Section 6 should be considered in the light of these amendments. Many of the rulings of the Commission and the courts are now obsolete because of the changes made in the form of amendments. From 1889 to 1906 advances in rates were permitted on ten days public notice, and reductions on three days notice.

Under the Hepburn Act of 1906, no changes can be made except after thirty days notice, but the Commission is empowered to modify this requirement upon good cause shown. The Hepburn Act also requires the schedules filed with the Commission to show not only the terminal charges and rules and regulations which affect rates as required by the original act, but also storage, icing and all other charges which the Commission might require, and all privileges and facilities granted or allowed as well as the value of any service rendered to a passenger or shipper. The original Act prohibited all carriers from receiving a greater or less compensation than the rate on file; the Hepburn Act prohibits carriers from receiving a greater or less *or different* compensation.<sup>2</sup> The last four paragraphs of Section 6 were added by an amendment in 1910.

2. See *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671, in which the court said: "But the act of June 29, 1906 made a material addition to the words of the act of 1887; for, it expressly prohibited any carrier, unless otherwise provided, to demand, collect or receive 'a

greater or less or *different* compensation' for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in the tariff filed and in effect at the time. We cannot suppose that this change was without a distinct purpose on the part of Congress. The words 'or differ-

§ 249. **Purpose of Congress in the Passage of the Provisions of Section 6 of the Act.** The purpose of Congress in the enactment of the provisions of Section 6 was to require equal and uniform treatment to all shippers by charging but one rate to all for similar services, being the rate filed with the Commission and

ent,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them. *Market v. Hoffman*, 101 U. S. 112, 115. The history of the acts relating to commerce shows that Congress, when introducing into the act of 1906 the word 'different,' had in mind the purpose of curing a defect in the law and of suppressing evil practices under it by prohibiting the carrier from charging or receiving compensation except as indicated in its published tariff. 11th Ann. Rep. Interstate Com. Com., 141; 19th Ib. 78, 15; 40 Cong. Rec. Pt. 7, p. 6608; 1b. 6617; 1b. 7428, 7434; Rept. of Confer. Com. 40 Cong. Rec. 9522; 42 Cong. Rec. Pt. 2, p. 1746. In our opinion, after the passage of the commerce act the railroad company could not lawfully accept from Mottley and wife any compensation 'different' in kind from that mentioned in its published schedule of rates. And it cannot be doubted that the rates or charges specified in such schedule were payable only in money. They could not be paid in any other way, without producing the utmost confusion and defeating the policy established by the acts regulating commerce. The evident purpose of Congress was to establish uniform rates for transportation, to give all the same opportunity to know

what the rates were as well as to have the equal benefit of them. To that end the carrier was required to print, post and file its schedules and to keep them open to public inspection. No change could be made in the rates embraced by the schedules except upon notice to the Commission and to the public. But an examination of the schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier. That money only was receivable for transportation is the basis upon which the Interstate Commerce Commission has proceeded; for, in one of its Conference Rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules."



published as required by the statute;<sup>3</sup> to establish uniform rates for transportation so that all might have the same opportunity to know what the rates are as well as to have the equal benefit of them, by means of printing, posting, filing and keeping open to public inspection the schedules of the carriers;<sup>4</sup> to secure to the public knowledge of the rates to be charged for services rendered;<sup>5</sup> to prevent departures from schedules and rates filed with the Commission through oral agreements, special contracts or other devices;<sup>6</sup> to make the public tariff rate binding on shippers and carriers alike;<sup>7</sup> to prohibit all means that might be resorted to, to obtain or receive concessions and rebates from the fixed rates duly posted and published;<sup>8</sup> to suppress unjust discriminations, undue preferences and secret agreements as to interstate rates by requiring that such rates be established in a manner calculated to give them publicity,

3. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315; *Santa Fe, P. & P. Ry. Co. v. Grant Bros. Const. Co.*, 228 U. S. 177, 57 L. Ed. 787, 33 Sup. Ct. 474; *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501; *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272; *New York Cent. & H. River R. Co. v. United States*, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct.

628; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272; *Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802.

4. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. Ed. 896, 13 Sup. Ct. 970.

5. *Schultz-Hansen Co. v. Southern P. Co.*, 18 I. C. C. 234.

6. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391.

7. *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380, 8 N. C. C. A. 53.

8. *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272.



to make them inflexible while in force and to cause them to be unalterable except in the mode prescribed,<sup>9</sup> and to secure uniformity, reasonableness and certainty of all charges for services.<sup>10</sup>

**§ 250. Publication and Filing of all Rates, Fares and Charges for Interstate Transportation Mandatory.** Under the provisions of Section 6 of the Act,<sup>11</sup> every common carrier subject to the provisions of the Act, is required to print, keep open to public inspection and file with the Commission schedules showing all rates, fares and charges for transportation between points on its own route and between points on its own route and points on the route to any other carrier by railroad, pipe line or water, when a through route and joint rate have been established.<sup>12</sup> If no joint rate is established, then the several carriers are required to publish separately established rates, fares and charges applying to the through transportation.<sup>13</sup>

9. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316.

10. *Louisville & N. R. Co. v. Dickerson*, 112 C. C. A. 295, 191 Fed. 705.

11. Appendix A, *infra*.

12. *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.*, 224 U. S. 474, 56 L. Ed. 849, 32 Sup. Ct. 556; *United States v. Miller*, 223 U. S. 599, 56 L. Ed. 568, 32 Sup. Ct. 323; *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; *United States v. Grand Trunk Ry. Co. of Canada*, 225 Fed. 283; *Standard Oil Co. of Indiana v. United States*, 90 C. C. A. 364, 164 Fed. 376; *Chicago & A. Ry. Co. v. United States*, 84 C. C.

A. 324, 156 Fed. 558, 26 L. R. A. (N. S.) 551; *Aransas Pass. Channel & Dock Co. v. Galveston, H. & S. A. Ry. Co.*, 27 I. C. C. 403; *Augusta & S. S. S. Co. v. Ocean S. S. Co. v. Savannah*, 26 I. C. C. 380; *In re Restricted Rates*, 20 I. C. C. 426; *Milburn Wagon Co. v. Lake Shore & M. S. Ry. Co.*, 18 I. C. C. 144; *Wabash R. Co. v. Priddy*, 179 Ind. 483, 101 N. E. 724; *Hunter v. St. Louis & S. F. R. Co.*, 167 Mo. App. 624, 150 S. W. 733.

13. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; *Platten Produce Co. v. Chicago & N. W. Ry. Co.*, 25 I. C. C. 30; *Eagle Pass Lumber Co. v. National Rys. of Mexico*, 25 I. C. C. 5; *St. Louis Blast Furnace Co. v. Virginian Ry.*, 24 I. C. C. 360; *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839; *Wabash R.*

No carrier, unless otherwise provided by statute, is permitted to engage or participate in the transportation of passengers or property as defined in the Act, unless the rates, fares and charges upon which the same are transported have been filed and published in accordance with the Act.<sup>14</sup> All carriers are prohibited from charging, demanding, collecting or receiving a greater or less or different compensation for such transportation or for any service connected therewith, between points named in the tariffs, than the rates, fares and charges which are specified in the tariffs filed and in effect.<sup>15</sup> The statute also prohibits carriers from re-

Co. v. Priddy, 179 Ind. 483, 101 N. E. 724; Robinson v. Louisville & N. R. Co., 160 Ky. 235, 169 S. W. 831; Pecos & N. T. Ry. Co. v. Porter, — Tex. Civ. App. —, 156 S. W. 267.

14. Cincinnati, N. O. & T. P. Ry. Co. v. Rankin, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. 138, 58 L. Ed. 1255, 34 Sup. Ct. 885; Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 57 L. Ed. 787, 33 Sup. Ct. 474; J. H. Hamlen & Sons v. Illinois Cent. R. Co., 212 Fed. 324; United States v. Illinois Terminal R. Co., 168 Fed. 546; Wisconsin Cent. R. Co. v. United States, 94 C. C. A. 444, 169 Fed. 76; Hampton Mfg. Co. v. Old Dominion S. S. Co., 27 I. C. C. 666; Maxwell v. Wichita Falls & N. W. Ry. Co., 20 I. C. C. 197; Beekman Lumber Co. v. Louisville Ry. & Nav. Co., 19 I. C. C. 343; Star Grain & Lumber Co. v. Atchison, T. & S. F. R. Co., 17 I. C. C. 338.

15. United States. Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915 A 315; Chicago, I. & L. R. Co. v.

United States, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; Cleveland, C., C. & St. L. R. Co. v. Hirsch, 123 C. C. A. 145, 204 Fed. 849; Louisville & N. R. Co. v. Dickerson, 112 C. C. A. 295, 191 Fed. 705; Chicago, B. & Q. R. Co. v. Feintuch, 112 C. C. A. 126, 191 Fed. 482; United States v. Pennsylvania R. Co., 153 Fed. 625; United States v. Wood, 145 Fed. 405; In re Commutation, Mileage & Excursion Tickets, 23 I. C. C. 95; Dietz Lumber Co. v. Atchison, T. & S. F. R. Co., 22 I. C. C. 75; Ford Co. v. Michigan Cent. R. Co., 19 I. C. C. 507; Blinn Lumber Co. v. Southern P. Co., 18 I. C. C. 430; Old Dominion Copper Mining & Smelting Co. v. Pennsylvania R. Co., 17 I. C. C. 309; Brooks Co. v. Rutland R. Co., 16 I. C. C. 479.

**Alabama.** Southern Ry. Co. v. Harrison, 119 Ala. 539, 24, 43 L. R. A. 385, 72 Am. St. Rep. 936, 24 So. 552.

**Georgia.** Central of Georgia R. Co. v. O'Neill Mfg. Co., 19 Ga. App. 490, 91 S. E. 877.

funding or remitting in any manner or by any device any portion of the rates, fares and charges so specified, or extending to any shipper or facility in the transportation of passengers or property except such as are specified in the tariffs.<sup>16</sup>

**§ 251. Necessary Steps to Put Rates Legally in Force—Posting not Essential.** While the statute requires the carrier, in addition to printing and filing with the Commission its schedules of rates and charges, to keep copies of the schedules so filed, posted in two public and conspicuous places in every station where freight and passengers are received for interstate transportation in such form as to be accessible to the public, the posting of the schedules is not a condition precedent to the establishment and putting in force the tariffs of rates; for the duty of posting two copies in each station

**Indiana.** *Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co.*, 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28.

**Louisiana.** *Louisiana Ry. & Nav. Co. v. Holly*, 127 La. 615, 53 So. 882.

**Massachusetts.** *New York, N. H. & H. R. Co. v. York & Whitney Co.*, 215 Mass. 36, 102 N. E. 366.

**Missouri.** *St. Louis Southern R. Co. v. Texas v. Spring River Stone Co.*, 169 Mo. App. 109, 154 S. W. 465.

**New Mexico.** *Pecos Valley & N. E. R. Co. v. Harris*, 14 N. M. 410, 94 Pac. 951.

**Pennsylvania.** *Crane R. Co. v. Central R. of New Jersey*, 248 Pa. 333, 93 Atl. 1076; *Central R. Co. of New Jersey v. Mauser*, 241 Pa. 603, 49 L. R. A. (N. S.) 92, 88 Atl. 791.

16. **United States.** *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 61 L. Ed. 839, 37 Sup. Ct. 434; *Fourche River Lumber Co.*

*v. Bryant Lumber Co.*, 230 U. S. 316, 57 L. Ed. 1498, 33 Sup. Ct. 887; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272; *New York Cent. & H. River R. Co. v. United States*, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; *Johnson-Brown Co. v. Delaware, L. & W. R. Co.*, 239 Fed. 590; *United States v. Lehigh Valley R. Co.*, 222 Fed. 685; *Illinois Cent. R. Co. v. Segari & Co.*, 205 Fed. 998; *Taenzer & Co. v. Chicago, R. I. & P. R. Co.*, 112 C. C. A. 153, 191 Fed. 543; *St. Louis Blast Furnace Co. v. Virginian Ry. Co.*, 24 I. C. C. 360; *Poise Commercial Club v. Adams Exp. Co.*, 17 I. C. C. 115.

**Iowa.** *McManus v. Chicago Great Western R. Co.*, 156 Ia. 359, 136 N. W. 769.

**Kentucky.** *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198.

is only required as a method of affording special facilities to the public for ascertaining the rates actually in force.<sup>17</sup>

Under the statute, posting and publication are essentially distinct; one means the printing of the schedules, filing them with the Commission and keeping them open to public inspection, while the other is a method of permitting the public to ascertain the lawful rates so fixed. A shipper was indicted for violation of the Interstate Commerce Act, the indictment alleging that he knowingly accepted a rebate whereby property was transported in interstate commerce "at a less rate than that named in the tariffs published and filed by such carrier as is required by said Act." There was no further allegation in the indictment that the schedules and tariffs alleged to have been violated were posted in the manner required by law. The sufficiency of the indictment being raised by demurrer, the question was presented for decision whether the compliance with the requirements of the Act as to posting of tariffs in stations and depots was a condition precedent to the establishment of the tariff. The trial court sustained the demurrer;<sup>18</sup> but on appeal to the Supreme Court, the decision of the lower court was reversed. "It is the contention of the defendants," said Mr. Justice Van Devanter for the Court,<sup>19</sup> "that a tariff is not published

**Mississippi.** *Illinois Cent. R. Co. v. Holman*, 106 Miss. 449, 64 So. 7.

**New York.** *Houseman v. Fargo*, 124 N. Y. Supp. 1086.

**North Dakota.** *Smith v. Great Northern R. Co.*, 15 N. D. 195, 107 N. W. 56.

**Washington.** *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 41 L. R. A. (N. S.) 559, 123 Pac. 998.

17. *Berwind-White Coal Min. Co. v. Chicago & E. R. Co.*, 235 U. S. 371, 59 L. Ed. 275, 35 Sup. Ct. 131; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683,

33 Sup. Ct. 391; *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; *United States v. Miller*, 223 U. S. 599, 56 L. Ed. 568, 32 Sup. Ct. 323; *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562, 27 Sup. Ct. 358; *United States v. Standard Oil Co.*, 170 Fed. 988.

18. *United States v. Miller*, 187 Fed. 375.

19. *United States v. Miller*, 223 U. S. 599, 56 L. Ed. 568, 32 Sup. Ct. 323.



in the sense in which the act uses that term unless printed copies are 'kept posted in two public and conspicuous places in every depot,' etc., and it was this contention that prevailed in the Circuit Court. But, in our opinion, it is not sound. Publication and posting in the sense of the act are essentially distinct. This is the import of the provision that the requirements relating to 'publishing, posting and filing' may be modified by the commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates, a result which evidently is not intended by the act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed. Like views of the posting clause were expressed in *Texas and Pacific Railway Co. v. Cisco Oil Mill*, 204 U. S. 449, and upon further consideration we perceive no reason for departing from them. See also *Kansas City Southern Railway Co. v. Albers Commission Co.*, *ante*, p. 573."

**§ 252. What the Schedules of Rates, Fares and Charges Filed with the Commission Must Contain.** Section 6 further provides that the schedules so printed, filed and published must state the place between which property and passengers will be carried, shall contain the classification of freight in force, shall contain separ-

rately all terminal charges, storage charges, icing charges and all other charges which the Commission may require,<sup>20</sup> shall include all privileges or facilities granted or allowed,<sup>21</sup> and any rules or regulations which in any wise affect, change or determine any part of or the aggregate of such rates, fares and charges, or the value

20. *Swift & Co. v. Hocking Valley R. Co.*, 243 U. S. 281, 61 L. Ed. 722, 37 Sup. Ct. 287; *Berwind-White Coal Min. Co. v. Chicago & E. R. Co.*, 235 U. S. 371, 59 L. Ed. 275, 35 Sup. Ct. 131; *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 234 U. S. 294 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814; *Proctor & Gamble Co. v. United States*, 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. 761; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824; *Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co.*, 167 U. S. 633, 42 L. Ed. 306, 17 Sup. Ct. 986; *Cudahy Packing Co. v. Grand Trunk Western R. Co.*, 131 C. C. A. 401, 215 Fed. 93; *Knudsen-Ferguson Fruit Co. v. Chicago, St. P. M. & O. R. Co.*, 79 C. C. A. 483, 149 Fed. 973; *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. 755; *Mixed Car Dealers Ass'n v. Delaware, L. & W. R. Co.*, 33 I. C. C. 133; *Wilson Bros. v. Delaware, L. & W. R. Co.*, 25 I. C. C. 11; *Proctor & Gamble Co. v. Cincinnati, H. & D. Ry. Co.*, 19 I. C. C. 556; *Leonard v. Chicago, M. & St. P. Ry. Co.*, 12 I. C. C. 492; *Cudahy Packing Co. v. Chicago & N. W. Ry. Co.*, 12 I. C. C. 446; *Shiel & Co. v. Illinois Cent. R. Co.*, 12 I. C. C. 210; *Blackman v. Southern Ry. Co.*, 10 I. C. C. 352; *Central Yellow Pine Ass'n*

*v. Vicksburgh, S. & P. R. Co.*, 10 I. C. C. 193; *Pennsylvania Millers' State Ass'n v. Philadelphia & R. Ry. Co.*, 8 I. C. C. 531; *Erie R. Co. v. Wanaque Lumber Co.*, 75 N. J. L. 878, 69 Atl. 168; *New York Cent. & H. River R. Co. v. General Elec. Co.*, 83 N. Y. Misc. 529, 146 N. Y. Supp. 322.

21. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501; *United States v. Erie R. Co.*, 209 Fed. 283; *Elwood Grain Co. v. St. Joseph & G. I. R. Co.*, 121 C. C. A. 153, 202 Fed. 845; *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486; *Kern & Sons v. Chicago, M. & St. P. Ry. Co.*, 40 I. C. C. 552; *Sulzberger & Sons v. Minneapolis, St. P. & S. S. M. R. Co.*, 40 I. C. C. 173; *Industrial Railways Case*, 29 I. C. C. 212; *Beaumont & G. N. R. Co. v. Atchison, T. & S. F. R. Co.*, 24 I. C. C. 161; *Liberty Mills v. Louisville & N. R. Co.*, 23 I. C. C. 182; *Associated Jobbers of Los Angeles v. Atchison, T. & S. F. Ry. Co.*, 18 I. C. C. 310; *Schultz-Hansen Co. v. Southern P. Co.*, 18 I. C. C. 234; *Kile & Morgan Co. v. Deepwater Ry.*, 15 I. C. C. 235; *Folmer & Co. v. Great N. R. Co.*, 15 I. C. C. 33; *Gulf & S. I. R. Co. v. Laurel Cotton Mills*, 91 Miss. 166, 45 So. 982; *Bergin v. Missouri, K. & T. Ry. Co.*, — Tex. Civ. App. —, 150 S. W. 1184.

of the service rendered to the passenger, shipper or consignee.<sup>22</sup>

The schedules are required to be plainly printed in large type and copies for the use of the public are required to be kept posted in two public and conspicuous places in every station or office of each carrier where either passengers or freight are received for transportation, and in such form that they shall be accessible to the public and be conveniently inspected. These provisions apply to all traffic, transportation and facilities defined by the Act. Common carriers receiving freight in the United States to be carried through a foreign country to any other place in the United States are required also in like manner to comply with the foregoing provisions. Carriers who are parties to any joint tariff other than the one filing the same, are required to file with the Commission such evidence of concurrence there-

22. *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 60 L. Ed. 517, 26 Sup. Ct. 228; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 593; *United States v. Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 34 Sup. Ct. 75; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; *Union Pac. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; *Interstate Commerce Commission v. Dittenbaugh*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; *Southern Cotton Oil Co. v. Central of Georgia R. Co.*, 142 C. C. A. 627, 228 Fed. 335; *Louisville & N. R. Co. v. Dickerson*, 112 C. C. A. 295, 191 Fed. 705; *Farmers' Cooperative Ass'n v. Chicago, B. & Q. R.*

*Co.*, 34 I. C. C. 60; *Red River Oil Co. v. Texas & P. Ry. Co.*, 23 I. C. C. 438; *California Pole & Piling Co. v. Southern P. Co.*, 22 I. C. C. 507; *Crescent Coal & Mining Co. v. Baltimore & O. R. Co.*, 20 I. C. C. 559; *Riter v. Oregon Short Line R. Co.*, 19 I. C. C. 443; *Anderson Clayton & Co. v. Chicago, R. I. & P. Ry. Co.*, 18 I. C. C. 340; *Duluth Log Co. v. Chicago, St. P. M. & O. Ry. Co.*, 16 I. C. C. 38; *General Elec. Co. v. New York Cent. & H. River R. Co.*, 14 I. C. C. 237; *National Wholesale Lumber Dealers' Ass'n v. Atlantic Coast Line R. Co.*, 14 I. C. C. 154; *Victor Fuel Co. v. Atchison, T. & S. F. Ry. Co.*, 14 I. C. C. 119; *Spillers & Co. v. Louisville & N. R. Co.*, 8 I. C. C. 364; *Suffern Hunt & Co. v. Indiana, D. & W. R. Co.*, 7 I. C. C. 255; *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*, 90 Neb. 488, 134 N. W. 163.



in or acceptance thereof as may be required or approved by the Commission.<sup>23</sup>

**§ 253. Privileges or Facilities Furnished Shippers and Not Specified in Tariffs Unlawful.** All carriers subject to the statute who extend to any shipper or person any privilege or facility in the transportation of property under federal control, except such as are specified in the tariffs on file with the Interstate Commerce Commission, violate the provisions of Section 6.<sup>24</sup> When, therefore, the conditions of liability while the goods are retained after notice of arrival at a terminal point are stipulated in the bill of lading under the regulations filed with the Interstate Commerce Commission, those conditions are controlling as to the liability of the carrier and the parties cannot substitute therefor a special agreement not specified in the tariffs.<sup>25</sup> An allowance by a common carrier to the owners of an elevator on its line of \$1.75 per car on all grain received at the elevator from stations on the line of the carrier and unloaded into the elevator, was held to be unlawful, as it was not published in the tariffs of the carrier and a similar allowance was not made to other owners of elevators similarly situated.<sup>26</sup> All allowances made to shippers, even though reasonable in amount, are unlawful rebates unless published in the tariffs.<sup>27</sup>

**§ 254. Regulations Concerning Baggage of Interstate Passengers Must be Published.** As the act requires all common carriers subject thereto to file with the Commission all rules and regulations which in any

23. *In re Coal Rates on Stony Fork Branch*, 26 I. C. C. 168; *Edison Portland Cement Co. v. Delaware, L. & W. R. Co.*, 22 I. C. C. 382.

24. *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Chicago & A. Ry. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501.

25. *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469.

26. *Elwood Grain Co. v. St. Joseph & G. I. R. Co.*, 121 C. C. A. 153, 202 Fed. 845.

27. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486; *United States v. Chicago & A. Ry. Co.*, 148 Fed. 646.



wise change, affect or determine any part or the aggregate of the rates, fares or charges, or the value of any service rendered to any passenger, rules and regulations concerning the baggage of interstate passengers are within the terms of the statute.<sup>28</sup> In the Hooker case, cited, it appeared that the schedules of the carriers filed with the Interstate Commerce Commission contained a provision that the liability for personal baggage should not exceed \$100 in value for a passenger presenting a full ticket unless a greater value was declared and stipulated by the owner and excess charges thereon paid at the time of checking the baggage. The Supreme Judicial Court of Massachusetts permitted a recovery for the actual value of the baggage, a sum greatly in excess of the limitation fixed in the schedule. That court held that the limitation in the schedule was no part of the passenger rate or tariff, and that knowledge of the limitation in such regulations must be brought home to the shipper and assented to by him;<sup>29</sup> but this decision, on writ of error, was reversed by the United States Supreme Court which held that the baggage limitation on file with the Interstate Commerce Commission was binding upon a passenger without regard to his knowledge. Said the Court: "It is to be observed that the schedules are required to state, among other things, in naming certain charges, 'all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.' The question then is did the limitation as to liability for baggage based upon the requirement to declare its value when more than \$100 was to be recovered come within that provision. It seems to us that the ordinary signification of

28. *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D. 593.

29. *Hooker v. Boston & M. R. R.*, 209 Mass. 598, Ann. Cas. 1912B 669, 95 N. E. 945.

the terms used in the act would cover such requirements as are here made for the amount of recovery for baggage lost by the carrier. It is a regulation which fixes and determines the amount to be charged for the carriage in view of the responsibility assumed, and it also affects the value of the service rendered to the passenger. Such requirements are spoken of, in decisions dealing with them, as regulations; as, a common carrier 'may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter.' *York Co. v. Central R. R.*, 3 Wall. 107, 112. 'It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective and the carrier advised of the full extent of its responsibility, and, consequently, of the degree of precaution necessary upon its part, it may rightfully require, as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value; and if the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such additional charge as the risk fairly justifies.' *Railroad Co. v. Fraloff*, 100 U. S. 24, 27." \* \* \* This conclusion is further strengthened by the action of the Interstate Commerce Commission, in requiring by its Tariff Circular No. 15-A, entitled 'Regulations Governing the Construction and Filing of Freight Tariffs and Classification and Passenger Fare Schedules,' effective April 15, 1908, and in force at the time of the loss here in question, that: '34. Tariffs shall contain, in the order named (g) Rules and regulations which govern the tariff, the title of each rule or regulation to be shown in bold type. Under this head

all of the rules, regulations, or conditions which in any way affect the fares named in the tariff shall be entered. \* \* \* These rules shall include \* \* \* the general baggage regulations, and also schedule of excess-baggage rates, unless such excess-baggage rates are shown in tariff in connection with the fares.' This requirement is a practical interpretation of the law by the administrative body having its enforcement in charge, and is entitled to weight in construing the act. The act of June 18, 1910 (c. 309, 36 Stat. 539, 546), defining, in Sec. 1, the duties of carriers to make just and reasonable regulations affecting, among other things, the carrying of personal, sample and excess baggage, may be noted in passing. This statute was before the Commission in a case involving such regulations. Regulations Restricting the Dimensions of Baggage, 26 I. C. C. 292. Concerning it the Commission, by Clark, Chairman, said (p. 293): 'Prior to June 18, 1910, the act to regulate Commerce contained no specific provision relating to the interstate transportation of baggage, except in connection with the issuance of joint interchangeable mileage tickets. The Commission had, however, under authority of section 6, required carriers to publish and file their general baggage regulations and their schedules of excess-baggage rates. Section 1 was amended on the date named, the amendment, in so far as it is material, reading as follows: 'It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce \* \* \* just and reasonable regulations and practices affecting classifications, \* \* \* the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, \* \* \* the carrying of personal, sample and excess baggage.' And it is to be observed that the Commission considers its requirement with reference to including baggage regulations in the tariff schedules, quoted above, as adequate, for the same provisions appear in its current circular. We are therefore of the opinion that the requirement published concerning the amount of the liability of the defendant based upon additional payment where bag-



gage was declared to exceed \$100 in value was determinative of the rate to be charged and did affect the service to be rendered to the passenger, as it fixed the price to be paid for the service rendered in the particular case, and was, therefore, a regulation within the meaning of the statute."

**§ 255. Demurrage Charges on Interstate Shipments Must be Filed with Commission.** The statute requires the published tariff to show everything in the way of terminal regulations which in any way affects the cost of the service rendered by the carrier.<sup>30</sup> All terminal and storage charges are specifically required to be separately stated in the tariffs. The term "transportation" in Section 1 of the Act includes all services in connection with the receipt and delivery of property transported. Demurrage, being a charge for the detention of a car because of the use of the car and track until unloaded, is a terminal charge and is required to be filed with the Commission.<sup>31</sup>

**§ 256. No Changes in Rates, Fares and Charges Permitted Without Thirty Days Notice to the Commission.** It is further provided in Section 6 that no change shall be made in the rates, fares and charges or joint rates, fares and charges which have been filed and published by any common carrier in compliance with the Act, except after thirty days notice to the Commission and to the public, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect, and the proposed changes must be done by printing new schedules or be plainly indicated upon the schedules in force at the time and kept open for public inspection. The Commission may, however, in its discretion, for good cause shown, allow

30. *United States v. Standard Oil Co.*, 148 Fed. 719.

31. *Lehigh Valley R. Co. v. United States*, 110 C. C. A. 513, 188 Fed. 879; *Mitchie v. New York, N.*

*H. & H. R. Co.*, 151 Fed. 694; *Peale, Peacock & Kerr v. Central R. of New Jersey*, 18 I. C. C. 25; *Wilson Produce Co. v. Pennsylvania R. Co.*, 14 I. C. C. 170.



changes upon less than the thirty days' notice required and may modify the requirements of the law in respect to publishing, posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances and conditions.<sup>32</sup> The Commission is also authorized to prescribe the form in which the schedules required shall be kept open to public inspection. Any schedule that does not provide a given lawful notice of its effective date may be rejected by the Commission. A refusal or failure to comply with any regulation adopted or any order made by the Commission under the provisions of Section 6 subjects all carriers to a penalty of \$500 for each offense and \$25 for each day's continuance of the offense.

**§ 257. Carriers Prohibited from Departing to any Extent from Published Schedules of Rates and Charges Filed with Commission.** The rates and fares, both joint and separate, for interstate transportation, the terminal, storage, transit, demurrage, icing, and other charges required to be published by the Commission, all the privileges and facilities granted and allowed by carriers, and the rules and regulations which affect, change or determine any part of the rates or fares, or the value of any service rendered to any shipper, passenger or consignee, published and filed with the Commission as required by the provisions of Section 6, are binding upon all and are conclusive as to the rights of all interested parties unless attacked in a direct proceeding for that purpose before the Interstate Commerce Commission.<sup>33</sup>

32. *Acme Cement Plaster Co. v. St. Louis & S. F. R. Co.*, 22 I. C. C. 283.

33. *O'Keefe v. United States*, 240 U. S. 294, 60 L. Ed. 651, 36 Sup. Ct. 313; *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 60 L. Ed. 517, 36 Sup. Ct. 228; *Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. R. Co.*, 239 U. S. 446, 60 L. Ed. 375, 36 Sup. Ct. 137; *Pennsylvania R. Co. v. Clark Bros.*

*Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Louisville & N. R. Co. v. United States*, 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. Ed. 853, 35 Sup. Ct. 494, L. R. A. 1915E 665; *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 58 L.

A carrier cannot depart to any extent from the published schedules on file without incurring the drastic penalties prescribed by the statute;<sup>34</sup> for, under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge, and deviation from it is not permitted upon any pretext. This rule is undeniably strict and it obviously works hardship in many cases but it embodies the policy which has been adopted by Congress in the regulation of interstate transportation of freight and passengers in order to prevent unjust discriminations.<sup>35</sup> Whenever a schedule rate for trans-

Ed. 1255, 34 Sup. Ct. 885; *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291; *Simpson v. Shepard*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176; *Proctor & Gamble v. United States*, 225 U. S. 282, 56 L. Ed. 1091, 32 Sup. Ct. 761; *Interstate Commerce Commission v. Union Pac. Co.*, 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 236 Fed. 573; *St. Louis Southwestern Ry. Co. v. United States*, 234 Fed. 668; *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Ass'n*, 91 C. C. A. 39, 165 Fed. 1.

34. *Phillips v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. 444; *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Chicago & A. R. Co.*

*v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501; *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272; *Chicago & N. W. Ry. Co. v. William S. Stein Co.*, 233 Fed. 716; *Cleveland, C., C. & St. L. R. Co. v. Hirsch*, 123 C. C. A. 145, 204 Fed. 849; *Taenzer & Co. v. Chicago, R. I. & P. R. Co.*, 112 C. C. A. 153, 191 Fed. 543.

35. *United States. Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 219, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; *United States v. Union Mfg. Co.*, 240 U. S. 605, 60 L. Ed. 822, 36 Sup. Ct. 420; *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U. S. 34, 60 L. Ed. 511, 36 Sup. Ct. 230, L. R. A. 1917A 193; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. Ed. 853, 35 Sup. Ct. 494, L. R. A. 1915E 665; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup.

portation or a charge for any service rendered shippers in connection with interstate traffic is put into effect by

Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 593; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383; Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; St. Louis Southwestern R. Co. v. Burckett, 229 U. S. 603, 57 L. Ed. 1347, 33 Sup. Ct. 773; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; Pullman Co. v. State ex rel. Coleman, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. 232; Western U. Tel. Co. v. State ex rel. Coleman, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. 196; New York Cent. & H. River Co. v. United States, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; Gulf. C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; Alabama Great Southern R. Co. v. George H. McFadden & Bros., 232 Fed. 1000; Central R. of New Jersey, v. United States, 143 C. C. A. 569, 229 Fed. 501; Hocking Valley R. Co. v. United States, 127 C. C. A. 285, 210 Fed. 735; Illinois Cent. R. Co. v. S. Segari & Co., 205 Fed. 998; United States v. Philadelphia & R. Ry. Co., 184 Fed. 543; Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co., 94 C. C. A. 217, 168 Fed. 161, 21 L. R. A. (N.

S.) 982, 16 Ann. Cas. 613; Chicago, B. & Q. R. Co. v. United States, 85 C. C. A. 194, 157 Fed. 830.

**Alabama.** Seaboard Air Line R. Co. v. Patrick, 10 Ala. App. 341, 65 So. 437; Central of Georgia R. Co. v. Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 So. 202; Northern Alabama R. Co. v. Wilson Mercantile Co., 9 Ala. App. 269, 63 So. 34; Central of Georgia R. Co. v. Patterson, 6 Ala. App. 494, 60 So. 465; Louisville & N. R. Co. v. McMullen, 5 Ala. App. 662, 59 So. 683; Southern Ry. Co. v. Harrison, 119 Aa. 539, 43 L. R. A. 385, 72 Ann. St. Rep. 936, 24 So. 552.

**Colorado.** Atchison, T. & S. F. R. Co. v. Bowman, 61 Colo. 477, 158 Pac. 814.

**Georgia.** Central of Georgia R. Co. v. Curtis, 14 Ga. App. 716, 82 S. E. 318; Charleston & W. C. R. Co. v. Thompson, 13 Ga. App. 528, 80 S. E. 1097; Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019; Georgia R. R. v. Creety, 5 Ga. App. 424, 63 S. E. 528; Savannah, F. & W. Ry. Co. v. Bundick, 94 Ga. 775, 21 S. E. 995.

**Indiana.** Cleveland, C., C. & St. L. R. Co. v. Talge Mahogany Co., — Ind. —, 112 N. E. 890; St. Louis Southwestern R. Co. v. J. S. Patterson Const. Co., 181 Ind. 304, 104 N. E. 512; Wabash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724; Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; Terre Haute & L. R. Co. v. Erdel, 158 Ind. 344, 62 N. E. 706.

**Iowa.** Cedar Rapids Fuel Co. v. Illinois Cent. R. Co., — Iowa —, 160 N. W. 353.



publication in the form and manner as required by the statute, it thereby becomes the legal rate or charge

**Kansas.** Chicago, R. I. & P. R. Co. v. Theis, 96 Kan. 494, 152 Pac. 619; Christl v. Missouri Pac. R. Co., 92 Kan. 580, 141 Pac. 587; Metz v. Missouri Pac. R. Co., 90 Kan. 463, 135 Pac. 578; Oregon R. & Nav. Co. v. Thisler, 90 Kan. 5, 132 Pac. 539; Schenberger v. Union Pac. R. Co., 84 Kan. 79, 33 L. R. A. (N. S.) 391, 113 Pac. 433; Chicago, R. I. & P. Ry. Co. v. Hubbell, 54 Kan. 232, 38 Pac. 266.

**Kentucky.** Robinson v. Louisville & N. R. Co., 160 Ky. 235, 169 S. W. 831; Louisville & N. R. Co. v. Coquillard Wagon Works' Assignees, 147 Ky. 530, 144 S. W. 1080; Chesapeake & O. R. Co. v. Maysville Brick Co., 132 Ky. 643, 116 S. W. 1183.

**Louisiana.** Louisiana Ry. & Nav. Co. v. Holly, 127 La. 615, 53 So. 883; Foster, Glassel Co. v. Kansas City Southern R. Co., 121 La. 1053, 46 So. 1014.

**Minnesota.** Victor Produce Co. v. Western Transit Co., 135 Minn. 121, 160 N. W. 248.

**Missouri.** Foster Lumber Co. v. Atchison, T. & S. F. R. Co., 270 Mo. 629, 194 S. W. 281; Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co., 196 Mo. App. 471, 190 S. W. 650; Mott Store Co. v. St. Louis & S. F. R. Co., 184 Mo. App. 50, 168 S. W. 322; Dunne & Grace v. St. Louis & S. W. R. Co., 166 Mo. App. 372, 148 S. W. 997; Sutton v. St. Louis & S. F. R. Co., 159 Mo. App. 685, 140 S. W. 76; Drey & Kahn Glass Co. v. Missouri Pac. R. Co., 156 Mo. App. 178, 136 S. W. 757; Ward v. Missouri Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28; Gerber v. Wabash R. Co., 63 Mo. App. 145; Southern Wire Co. v. St. Louis

Bridge & Tunnel R. Co., 38 Mo. App. 191.

**New Hampshire.** Clough & Co. v. Boston & M. R. R., 77 N. H. 222, Ann. Cas. 1915B 1195, 90 Atl. 863.

**New Jersey.** Kells Mill & Lumber Co. v. Pennsylvania R. Co., 89 N. J. L. 490, 98 Atl. 309; Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379.

**New Mexico.** Enderstein v. Atchison, T. & S. F. R. Co., 21 N. M. 548, 157 Pac. 670; Pecos Valley & N. E. R. Co. v. Harris, 14 N. M. 410, 94 Pac. 951.

**New York.** Greenwald v. New York Cent. & H. River R. Co., 95 N. Y. Miss. 122, 159 N. Y. Supp. 15; Pennsylvania R. Co. v. Mogi, 71 N. Y. Misc. 412, 128 N. Y. Supp. 643; Baltimore & O. R. Co. v. La Due, 128 N. Y. App. Div. 594, 112 N. Y. Supp. 964.

**North Carolina.** Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 166 N. C. 62, 82 S. E. 1.

**North Dakota.** Knapp v. Minneapolis, St. P. & S. S. M. R. Co., 34 N. D. 466, 159 N. W. 81.

**Ohio.** Erie R. Co. v. Steinberg, 94 Ohio St. 189, L. R. A. 1917B 787, Ann. Cas. 1917E 661, 113 N. E. 814.

**Oklahoma.** Missouri, K. & T. R. Co. v. Walston, 37 Okla. 517, 133 Pac. 42.

**Pennsylvania.** Carr v. Pennsylvania R. Co., 88 N. J. L. 235, 96 Atl. 588; United States Horse Shoe Co. v. American Exp. Co., 250 Pa. 527, 95 Atl. 706; Central R. Co. of New Jersey v. Mauser, 241 Pa. 603, 49 L. R. A. (N. S.) 92, 88 Atl. 791.

**South Carolina.** Southern Ry. Co. v. Willmont Oil Mills, 105 S. C.



which all shippers are bound to pay and all carriers are required to collect.<sup>36</sup> Such published rates and charges may be unlawful because exorbitant or discriminatory in violation of sections 1 and 3 of the Act, but they remain the legal rates and charges until set aside by the Commission.<sup>37</sup>

**§ 258. Foregoing Rule Equally Applicable to Transit and Special Services Provided in Tariffs.** The principle that a rate, when published, is binding upon both carrier and shipper and cannot be departed from, except and until it has been, in due course, found by the Commission to be unlawful, governs also all transit and other special services provided in the tariffs of carriers. They, too, must be enforced in accordance with their terms, and when provisions therein are free and clear from ambiguity, no agreement between the shipper and the carrier assigning another meaning to them may lawfully be substituted. The Interstate Commerce Commission will not sanction a departure from their plain meaning

51, 89 S. E. 476; *Saunders v. Atlantic Coast Line R. Co.*, 101 S. C. 11, 85 S. E. 167.

**Tennessee.** *Louisville & N. R. Co. v. Hobbs*, 136 Tenn. 512, 190 S. W. 461; *Louisville & N. R. Co. v. Montgomery*, 136 Tenn. 171, 188 S. W. 1146; *Roberts v. Nashville, C. & St. L. R. Co.*, 135 Tenn. 48, 185 S. W. 69; *Rather & Co. v. Nashville, C. & St. L. R. Co.*, 131 Tenn. 289, 174 S. W. 1113.

**Texas.** *Pecos & N. T. Ry. Co. v. Hall*, — Tex. Civ. App. —, 189 S. W. 535; *Atchison, T. & S. F. Ry. Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70; *Wichita Falls & W. Ry. Co. of Texas v. Asher*, — Tex. Civ. App. —, 171 S. W. 1114; *Texas & P. R. Co. v. Leslie*, 62 Tex. Civ. App. 380, 131 S. W. 824.

**Vermont.** *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76.

**Virginia.** *Atlantic Coast Line R. Co. v. Virginia Mfg. Co.*, 119 Va. 5, 89 S. E. 103; *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

36. See cases cited under note 35, *supra*.

37. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 240 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Texas & P. Ry. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; *Gulf, C. & S. F. Ry. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802; *Franke Grain Co. v. Illinois Cent. R. Co.*, 27 I. C. C. 625; *Crescent Coal & Mining Co. v. Chicago & E. I. R. Co.*, 24 I. C. C. 149; *Church v. Minneapolis & St. L. Ry. Co.*, 14 S. D. 443, 85 N. W. 1001. In *Franke Grain Co. v. Illinois Cent. R. Co.*, *supra*, the case of *Kiel Woodenware Co. v. Chicago, M. & St. P. Ry. Co.*, 18 I. C. C. 242, was disapproved.

until, in a proper proceeding and upon a proper record, such rules have been found to be unlawful under the Act.<sup>38</sup>

§ 259. **Forwarders are Shippers within Statute Prohibiting Refunds from Published Rates and Charges.** The statute prohibits all carriers from refunding or remitting in any manner or by any device any portion of their published rates, fares or charges. An allowance to a shipper of a percentage upon the freight shipped by him over the line of a carrier as an inducement to ship over that line is unlawful.<sup>39</sup> Forwarders of freight who ship goods in their own name for others, are shippers within the meaning of this statute.<sup>40</sup> An arrangement, therefore, between a carrier and a firm engaged in the business of forwarding freight in its own name for others by which the forwarder was paid a commission on all the commodities shipped over the carrier's line, is a violation of the statute.<sup>41</sup>

Such allowances are not for "transportation services" within the meaning of Section 15 of the Act; nor are they within the rule that a carrier has the right to employ persons to solicit business and to pay them for such work. When such payments for the solicitation of business are made to a shipper, they constitute unlawful rebates and concessions condemned by the law. "Any payment made by a carrier to a shipper," said Mr. Justice Holmes in *Lehigh V. R. Co. v. United States*, cited *supra*, "in consideration of his shipping goods over the carrier's line comes within the prohibiting words. It is true, no doubt, that George W. Sheldon & Company in the performance of the services for which it is paid, maintains offices here and abroad, ad-

38. *Peters Mill Co. v. Chicago, B. & Q. R. Co.*, 38 I. C. C. 245.

39. *Wight v. United States*, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. 822.

40. *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380, 8 N. C. C. A.

53; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. 448, 31 Sup. Ct. 392.

41. *Lehigh Valley R. Co. v. United States*, 243 U. S. 444, 61 L. Ed. 839, 37 Sup. Ct. 434.

vertises the railroad, solicits traffic for it, does various other useful things, and, in short, we assume, benefits the road and earns its money, if it were allowable to earn money in that way. It is true also that in *Interstate Commerce Commission v. F. H. Peavey & Co.*, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22, an owner of property transported was held entitled, under sec. 15 of the Act to Regulate Commerce, to an allowance for furnishing a part of the transportation that the carrier was bound to furnish. So *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. Rep. 39, and *United States v. Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. Rep. 75. But that case goes to the verge of what is permitted by the act. The services rendered by *George W. Sheldon & Company*, although in a practical sense 'connected with such transportation,' were not connected with it as a necessary part of the carriage,—were not 'transportation service,' in the language of *Union P. R. Co. v. Updike Grain Co.*, 222 U. S. 215, 220, 56 L. Ed. 171, 173, 32 Sup. Ct. Rep. 39,—and, in our opinion, were not such services as were contemplated in the Act of June 29, 1906, chap. 3591, sec. 4, 34 Stat. at L. 589, Comp. Stat. 1913, sec. 8583, amending sec. 15 of the original act. On the other hand, the allowance for them falls within the plain meaning of sec. 2 of the Act of 1906, to which we referred above."

**§ 260. Oral Contracts or Special Arrangements for Interstate Transportation Contravening Published Schedules, Unlawful.** As the statute forbids all carriers from refunding or remitting in any manner or by any device any portion of the scheduled rates, or extending to any shipper any privilege or facility except such as are specified in the established tariffs filed with the Commission, all contracts or special arrangements as to interstate shipments in conflict with or in contravention of the schedules, rules and regulations thus standardized and filed, are unlawful.<sup>42</sup> Shippers as well as carriers

42. *United States. Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Atchison, T. & S. F. R. Co. v. Moore*, 233



are required to take notice of the tariffs on file, and as long as they remain operative they are conclusive as to the rights of all parties. To give effect to oral agreements and to maintain their supremacy over the pub-

U. S. 182, 58 L. Ed. 906, 34 Sup. Ct. 558; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380, 8 N. C. C. A. 53; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Wells, Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1915A 501; *American Exp. Co. v. United States*, 212 U. S. 522, 53 L. Ed. 635, 29 Sup. Ct. 315; *Lewis, Leonhardt & Co. v. Southern R. Co.*, 133 C. C. A. 237, 217 Fed. 321; *Cudahy Packing Co. v. Grand Trunk Western R. Co.*, 131 C. C. A. 401, 215 Fed. 93; *Engemoen v. Chicago, St. P., M. & O. R. Co.*, 127 C. C. A. 426, 210 Fed. 896; *Duplan Silk Co. v. American & Foreign Marine Ins. Co.*, 124 C. C. A. 18, 205 Fed. 724; *Clegg v. St. Louis & S. F. R. Co.*, 122 C. C. A. 273, 203 Fed. 971; *Atchison, T. & S. F. Ry. Co. v. Kinkade*, 203 Fed. 165; *Elwood Grain Co. v. St. Joseph & G. I. R. Co.*, 121 C. C. A. 153, 202 Fed. 845; *Taenzer & Co. v. Chicago, R. I. & P. R. Co.*, 112 C. C. A. 153, 191 Fed. 543; *Chesapeake & O. Ry. Co. v. Standard Lumber Co.*, 98 C. C. A. 81, 174 Fed. 107; *Chicago & A. R. Co. v. United States*, 84 C. C. A. 224, 156 Fed. 558, 26 L. R. A. (N. S.) 551; *Crowell & Spencer Lum-*

*ber Co. v. Texas & P. Ry. Co.*, 17 I. C. C. 333; *Hood & Sons v. Delaware & H. Co.*, 17 I. C. C. 155; *Swift & Co. v. Chicago & A. R. Co.*, 16 I. C. C. 426.

**Alabama.** *Northern Alabama R. Co. v. Wilson Mercantile Co.*, 9 Ala. App. 269, 63 So. 34; *Central of Georgia R. Co. v. Patterson*, 6 Ala. App. 494, 60 So. 465.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763.

**Indiana.** *Wabash R. Co. v. Pridy*, 179 Ind. 483, 101 N. E. 724.

**Massachusetts.** *New York, N. H. & H. R. Co. v. York & Whitney Co.*, 215 Mass. 36, 102 N. E. 366.

**Missouri.** *Morrison Grain Co. v. Missouri Pac. R. Co.*, 182 Mo. App. 339, 170 S. W. 404.

**New Hampshire.** *Clough & Co. v. Boston & M. R. R.*, 77 N. H. 222, Ann. Cas. 1915B 1195, 90 Atl. 863.

**Pennsylvania.** *United States Horse Shoe Co. v. American Exp. Co.*, 250 Pa. 527, 95 Atl. 706; *Central R. Co. of New Jersey v. Mauser*, 241 Pa. 603, 49 L. R. A. (N. S.) 92, 88 Atl. 791.

**South Carolina.** *Jordan v. Southern R. Co.*, 100 S. C. 284, 84 S. E. 871.

**Tennessee.** *Roberts v. Nashville, C. & St. L. R. Co.*, 135 Tenn. 48, 185 S. W. 69.

**Texas.** *St. Louis, I. M. & S. Ry. Co. v. West Bros.*, — Tex. Civ. App. —, 159 S. W. 142.

**Virginia.** *Southern R. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

**Washington.** *Southern Pac. Co. v. Frye & Bruhn* 82 Wash. 9, 143 Pac. 162.



lished schedules, would defeat the principle of equal treatment to all shippers, one of the purposes of the Interstate Commerce Act.

It is the duty of a carrier to collect the regularly established and published rates and to observe all the regulations filed with the Commission, and it is the corresponding obligation of a shipper to pay such rates and to adhere to such regulations, regardless of any understanding, agreement or any other act of the parties.<sup>43</sup> For example, a contract for the transportation of

**43. United States.** Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. R. Co., 239 U. S. 446, 60 L. Ed. 375, 36 Sup. Ct. 137; Kansas City Southern R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 54 L. Ed. 300, 30 Sup. Ct. 184; Hocking Valley R. Co. v. Lackawanna Coal & Lumber Co., 140 C. C. A. 408, 224 Fed. 930; Union Pac. R. Co. v. American Smelting & Refining Co., 121 C. C. A. 182, 202 Fed. 720.

**Alabama.** Central of Georgia R. Co. v. Southern Ferro Concrete Co., 193 Ala. 108, 68 So. 981; Central of Georgia R. Co. v. Birmingham Sand & Brick Co., 9 Ala. App. 419, 64 So. 202; Southern Ry. Co. v. Harrison, 11<sup>st</sup> Ala. 539, 43 L. R. A. 385, 72 Ann. St. Rep. 936, 24 So. 552.

**Arkansas.** St. Louis & S. F. Ry. Co. v. Ostrander, 66 Ark. 567, 52 S. W. 435; Kizer v. Texarkana & Ft. S. Ry. Co., 66 Ark. 348, 50 S. W. 871.

**Georgia.** Central of Georgia R. Co. v. Curtis, 14 Ga. App. 716, 82 S. E. 318; Brantley Co. v. Ocean S. S. Co., 5 Ga. App. 844, 63 S. E. 1129; Raleigh & G. R. Co. v. Swanson, 102 Ga. 754, 39 L. R. A. 275, 28 S. E. 601; Savannah. F. & W.

Ry. Co. v. Bundick, 94 Ga. 775, 21 S. E. 995.

**Indiana.** Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28.

**Indian Territory.** Missouri, K. & T. Ry. Co. v. Bowles, 1 Indian T. 250, 40 S. W. 899.

**Iowa.** Coad v. Chicago, St. P., M. & O. R. Co., 171 Iowa 747, 154 N. W. 396; Lanner v. Wabash R. Co., 131 Iowa 405, 108 N. W. 759.

**Kansas.** Oregon R. & Nav. Co. v. Thisler, 90 Kan. 5, 133 Pac. 539; Chicago, R. I. & P. Ry. Co. v. Hubbell, 54 Kan. 232, 38 Pac. 266.

**Kentucky.** Louisville & N. R. Co. v. Coquillard Wagon Works' Assignees, 147 Ky. 530, 144 S. W. 1080.

**Louisiana.** Foster, Glassel Co. v. Kansas City Southern R. Co., 121 La. 1053, 46 So. 1014.

**Maine.** Johnson v. New York, N. H. & H. R. R., 111 Me. 263, 88 Atl. 988.

**Mississippi.** Gulf & S. I. R. Co. v. Laurel Cotton Mills, 91 Miss. 166, 45 So. 982.

**Missouri.** Dunne & Grace v. St. Louis & S. W. R. Co., 166 Mo. App. 372, 148 S. W. 997; Sutton v. St. Louis & S. F. R. Co., 159 Mo. App. 685, 140 S. W. 76; Gerber v. Wabash R. Co., 63 Mo. App. 145.

livestock to a market within a limited time, when not authorized or provided for by the published tariffs of the carrier, is void.<sup>44</sup> Similarly a verbal contract with an agent of a railway company for the transportation of race horses on a certain train, which was in conflict with the schedules and regulations of the carrier, published as required by Section 6, was held to be invalid.<sup>45</sup> In another case,<sup>46</sup> a shipper sued an interstate

**New Hampshire.** Clough & Co. v. Boston & M. R. R., 77 N. H. 222. Ann. Cas. 1915B 1195, 90 Atl. 863.

**New Mexico.** Pecos Valley & N. E. R. Co. v. Harris, 14 N. M. 410, 94 Pac. 951.

**New York.** Pennsylvania R. Co. v. Titus, 216 N. Y. 17, L. R. A. 1916E 1127, 109 N. E. 857; Pennsylvania R. Co. v. Titus, 78 N. Y. Misc. 347, 138 N. Y. Supp. 325; Houseman v. Fargo, 124 N. Y. Supp. 1086; Baltimore & O. R. Co. v. La Due, 128 N. Y. App. Div. 594, 112 N. Y. Supp. 964.

**North Carolina.** Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., 166 N. S. 62, 82 S. E. 1; Yorke Furniture Co. v. Southern R. Co., 162 N. C. 138, 78 S. E. 67.

**North Dakota.** Smith v. Great Northern R. Co., 15 N. D. 195, 107 N. W. 56.

**Oklahoma.** Atchison, T. & S. F. Ry. Co. v. Ehret, — Okla. —, 152 Pac. 1107; St. Louis & S. F. R. Co. v. Pickens, — Okla. —, 151 Pac. 1055; Atchison, T. & S. F. R. Co. v. Bell, 31 Okla. 238, 38 L. R. A. (N. S.) 351, 120 Pac. 987; Atchison, T. & S. F. R. Co. v. Holmes, 18 Okla. 92, 90 Pac. 22.

**Pennsylvania.** Crane R. Co. v. Philadelphia & R. R. Co., 253 Pa. 246, 97 Atl. 1055; Central R. Co. of New Jersey v. Mauser, 241 Pa.

603, 49 L.R.A. (N.S.) 92, 88 Atl. 791.

**South Carolina.** Hardaway v. Southern R. Co., 90 S. C. 475, Ann. Cas. 1913D 266, 73 S. E. 1020.

**South Dakota.** Melody v. Great Northern R. Co., 25 S. D. 606, 30 L. R. A. (N. S.) 568, Ann. Cas. 1912C 727, 127 N. W. 543; Church v. Minneapolis & St. L. Ry. Co., 14 S. D. 443, 85 N. W. 1001.

**Tennessee.** Roberts v. Nashville, C. & St. L. R. Co., 135 Tenn. 48 185 S. W. 69.

**Texas.** Texas & P. Ry. Co. v. Dickson Bros., — Tex. Civ. App. —, 167 S. W. 33; Texas & P. Ry. Co. v. Clark, 4 Tex. Civ. App. 611, 23 S. W. 698.

**Virginia.** Southern R. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144.

**Washington.** Fisher v. Great Northern R. Co., 49 Wash. 205, 95 Pac. 77.

44. Engemoen v. Chicago, St. P., M. & O. R. Co., 127 C. C. A. 426, 210 Fed. 896.

45. Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556, in which the court said: "The Supreme Court of the State in this case affirmed the instruction of the trial court upon which the case was given to the jury and held that the oral contract was binding unless it was affirmatively shown that the written agreement, based upon the filed schedules, was

carrier for the violation of a special contract made with him whereby the carrier agreed to expedite a shipment by making connections with a particular train, for the regularly established rates applying to all shipments.

In condemning such special arrangements not open to all shippers on like terms, the court said:<sup>47</sup> "The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract. For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done. The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy

brought to the knowledge of the shipper and its terms assented to by him. This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property, and no circumstances which would take the case out of the rulings heretofore made by this court as to the binding

effect of such filed schedules and the duty of the shipper to take notice of the terms of such rates and the obligation to be bound thereby in the absence of the exceptional circumstances to which we have referred."

46. *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501.

47. See also *Lewis, Leonhardt & Co. v. Southern R. Co.*, 133 C. C. A. 237, 217 Fed. 321.

for delay not due to negligence. An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation."

**§ 261. Shippers and Passengers Conclusively Presumed to Have Knowledge of Published Schedules of Rates, Fares and Charges.** All shippers and passengers are charged with notice of the schedules of rates, fares, charges and regulations duly published and on file with the Interstate Commerce Commission.<sup>48</sup> The rates so

48. **United States.** *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Louisville & N. R. Co. v. Maxwell* 237 U. S. 94, 59 L. Ed. 853, 35 Sup. Ct. 494, L. R. A. 1915E 665; *Berwind-White Coal Min. Co. v. Chicago & E. R. Co.*, 235 U. S. 371, 59 L. Ed. 275, 35 Sup. Ct. 131; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 593; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501; *New York Cent. & H. River R. Co. v. United States*, 212 U. S. 500, 53 L. Ed. 624, 29 Sup. Ct. 309; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26

Sup. Ct. 628; *Great Lakes Coal and Dock Co. v. Seither Transit Co.*, 136 C. C. A. 110, 220 Fed. 28; *Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co.*, 209 Fed. 895; *Taenzer & Co. v. Chicago, R. I. & P. R. Co.*, 112 C. C. A. 153, 191 Fed. 543; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 176 Fed. 748; *United States v. Great Northern R. Co.*, 157 Fed. 288; *Van Patten v. Chicago, M. & St. P. Ry. Co.*, 81 Fed. 545; *Franke Grain Co. v. Illinois Cent. R. Co.*, 27 I. C. C. 625; *Pole Stock Lumber Co. v. Gulf & S. I. R. Co.*, 26 I. C. C. 451; *Wisconsin Lime & Cement Co. v. Cleveland, C. C. & St. L. Ry. Co.*, 25 I. C. C. 366; *Johnson v. Atchison, T. & S. F. R. Co.*, 25 I. C. C. 207; *Humboldt Steamship Co. v. White Pass & Y. R. Co.*, 25 I. C. C. 136; *Faribault Furniture Co. v. Chicago G. W. R. Co.*, 25 I. C. C. 40; *Crescent Coal & Mining Co. v. Chicago & E. R. Co.*, 24 I. C. C. 149; *Follmer & Co. v. Bellingham B. & B. C. R. Co.*, 21 I. C. C. 617; *Running*



filed and promulgated become the lawful established rates and are as binding as though they had been prescribed by statute. The carrier must collect the lawful rate so fixed, and the shipper is compelled to pay it. A passenger's and shipper's knowledge of the scheduled rates and fares is conclusively presumed, and actual want of notice of the schedule is no defense to an action for the lawful rate.<sup>49</sup> In the leading case of *Texas & P. R.*

*v. Chicago, St. P., M. & O. Ry. Co.*, 19 I. C. C. 565; *Blinn Lumber Co. v. Southern P. Co.*, 18 I. C. C. 430; *Snyder-Malone-Donahue Co. v. Chicago, B. & Q. R. Co.*, 18 I. C. C. 498; *Williamette Pulp & Paper Co. v. Northern P. Ry. Co.*, 18 I. C. C. 388; *Laning-Harris Coal & Grain Co. v. St. Louis & S. F. R. Co.*, 15 I. C. C. 37; *Whitcomb v. Chicago & N. W. Ry. Co.*, 15 I. C. C. 27.

**Alabama.** *Southern Ry. Co. v. Harrison*, 119 Ala. 539, 43 L. R. A. 385, 72 Am. St. Rep. 936, 24 So. 552.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Faulkner*, 111 Ark. 430, 164 S. W. 763.

**Georgia.** *Central of Georgia R. Co. v. Curtis*, 14 Ga. App. 716, 82 S. E. 318.

**Indiana.** *Cleveland, C., C. & St. L. Ry. Co. v. Talge Mahogany Co.*, — Ind. —, 112 N. E. 890.

**Iowa.** *Herminghausen v. Adams Exp. Co.*, 167 Iowa 230, 149 N. W. 234.

**Kansas.** *Christl v. Missouri Pac. R. Co.*, 92 Kan. 580, 141 Pac. 587.

**Kentucky.** *Robinson v. Louisville & N. R. Co.*, 160 Ky. 235, 169 S. W. 831; *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198.

**Missouri.** *Sloop v. Delano*, 182 Mo. App. 299, 170 S. W. 385.

**New York.** *Pennsylvania R. Co. v. Titus*, 158 N. Y. App. Div. 880, 142 N. Y. Supp. 1134.

**Oklahoma.** *St. Louis & S. F. R. Co. v. Pickens*, — Okla. —, 151 Pac. 1055.

**Oregon.** *Zoller Hop Co. v. Southern Pac. Co.*, 72 Or. 262, 143 Pac. 931; *Baldwin Sheep & Land Co. v. Columbia R. Co.*, 58 Or. 285, 114 Pac. 469.

**South Carolina.** *Hardaway v. Southern R. Co.*, 90 S. C. 475, Ann. Cas. 1913D 266, 73 S. E. 1020.

**Texas.** *Wardlow v. Andrews*, — Tex. Civ. App. —, 180 S. W. 1161; *Pacific Exp. Co. v. Ross*, — Tex. Civ. App. —, 154 S. W. 340.

49. *Reno v. Wholesale Liquor Store v. Southern P. Co.*, 23 I. C. C. 516; *McLean Lumber Co. v. Louisville & N. R. Co.*, 22 I. C. C. 349; *Ohio Iron & Metal Co. v. Wabash R. Co.*, 18 I. C. C. 299; *Interstate Remedy Co. v. American Exp. Co.*, 16 I. C. C. 436; *Gough & Co. v. Illinois Cent. R. Co.*, 15 I. C. C. 280; *Poor Grain Co. v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 469. In *Poor v. Chicago, B. & Q. R. Co.*, *supra*, a case frequently cited on this point, the Commission said: "A carrier is required by law to published the rate and also clearly to indicate the route over which the published rate is applicable. When so published the rate named and the route designated stand as the law, binding as well upon the shipper as upon the carrier. A schedule of rates published in the manner

*Co. v. Mugg*,<sup>50</sup> the Supreme Court, in discussing the effect of a shipper's ignorance of the published rates, and quoting from another opinion, said: "The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one State to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other States are bound."

**§ 262. Courts Bound by Published Rates and Charges Until Set Aside by Commission.** The rates and charges fixed in the schedules for interstate and foreign transportation by carriers subject to the Act and all rules and regulations affecting the rates, fares and charges on file with the Commission and duly published, are binding upon all federal and state courts as well as upon the shippers and carriers. The Interstate Com-

provided by law speaks with equal authority to the shipper and to the carrier, and both are equally chargeable with notice of the rate and of the route over which the rate is made applicable. A mistake by a carrier in responding to any inquiry by a shipper, either as to the rate or as to the route, will relieve neither the one nor the other from the obligation of

fulfilling the law's requirements; in either event the carrier must collect and the shipper must pay the rate as published for the route over which the shipments actually move. This general rule is founded not only on the strict language of the law but also upon a sound public policy."

50. 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628.

merce Commission possesses, under the statute, the exclusive power to determine primarily the reasonableness of the rates and charges published in the schedules, and without such a preliminary determination by the Commission, the courts have no jurisdiction to pass upon the reasonableness of interstate rates and charges.<sup>1</sup> Actions for damages, therefore, without a prior finding by the Interstate Commerce Commission, cannot be maintained in the courts for the exaction of an unreason-

51. *Pennsylvania R. Co. v. Stineman Coal Min. Co.*, 242 U. S. 298, 61 L. Ed. 316, 37 Sup. Ct. 118; *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 61 L. Ed. 305, 37 Sup. Ct. 120; *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 60 L. Ed. 517, 36 Sup. Ct. 228; *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328. *Ann. Cas.* 1916B 691; *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 58 L. Ed. 1255, 34 Sup. Ct. 885; *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526. *L. R. A.* 1915B 450. *Ann. Cas.* 1915D 593; *Atchison, T. & S. F. R. Co. v. United States*, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *United States v. Pa-*

*cific & A. Ry. & Nav. Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. 715; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 56 L. Ed. 308, 32 Sup. Ct. 108; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114; *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. 651; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 *Ann. Cas.* 1075; *Lehigh Valley R. Co. v. Meeker*, 128 C. C. A. 311, 211 *Fed.* 785; *Lehigh Valley R. Co. v. Clark*, 125 C. C. A. 235, 207 *Fed.* 717; *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 92 C. C. A. 114, 166 *Fed.* 206; *Meeker v. Lehigh Valley R. Co.*, 162 *Fed.* 354; *Howard Supply Co. v. Chesapeake & O. Ry. Co.*, 162 *Fed.* 188; *American Union Coal Co. v. Pennsylvania R. Co.*, 159 *Fed.* 278; *Van Patten v. Chicago, M. & St. P. Ry. Co.*, 81 *Fed.* 545; *Wickwire Steel Co. v. New York Cent. & H. River R. Co.*, 27 I. C. C. 168; *St. Louis Southwestern R. Co. v. J. S. Patterson Const. Co.*, 181 *Ind.* 304, 104 *N. E.* 512.

able rate on an interstate shipment if the rate charged was in fact that fixed in the schedule published in conformity with the provisions of Section 6. The published rate is controlling until found to be unreasonable by the Interstate Commerce Commission in an appropriate proceeding before that body.

The necessity of having one tribunal to determine the question of the reasonableness of a rate appears evident; for, otherwise, the rate to be collected would be subject to the conflicting judgments of numerous juries as expressed in their verdicts in the various courts of the country. To permit the rates charged for interstate shipments to depend upon the verdicts of juries in the courts, would defeat one of the purposes of the Act, that is, one rate to all shippers for similar services. Uniformity and equality could not be secured by separate suits before separate courts involving the reasonableness of a rate and practice. The evidence might vary, and of course the verdict would vary with the result that one shipper would succeed before one jury and another fail before a different jury where the reasonableness of the same rate or practice was involved. Different verdicts would occasion inequality between two shippers.<sup>52</sup>

52. *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114, in which the court said: "For the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investi-

gate complaints and to order the correction of any non-conformity to those standards by an appropriate change in schedules and by due reparation to injured persons. When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the



Hence, Congress placed the duty of passing upon the reasonableness of the scheduled rates and charges

existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designated to secure. In the case of *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, where such a right was asserted and denied, it was said by this court: 'Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the admin-

istrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.' It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either, were to sustain it and award reparation, the con-

on the Commission exclusively so that a uniform standard might be fixed and followed. This principle was first pronounced by the Supreme Court in 1907.<sup>53</sup> In the case cited, suit was brought in a court of the state of Texas to recover, because of an exaction by a carrier, on an interstate shipment, of an alleged unreasonable rate although the rate charged was that stated in the schedules duly filed and published in accordance with the provisions of section 6. The court held that the relief prayed for was inconsistent with all the provisions of the Interstate Commerce Act since by that act the rates, as filed, were controlling until they had been declared to be unreasonable by the Commission on a complaint made to that body. It was pointed out that any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, and would frustrate the purposes of the Act.

**§ 263. Carriers Must Collect the Scheduled Rates and Charges for Interstate Transportation.** A strict adherence to the published rates and charges is absolutely essential to avoid discriminations and preferences between shippers. Neither estoppel, ignorance of the shipper nor a mistake of the carrier's agent can defeat the prime purpose of the law that the shipper must pay and the carrier must collect the lawful published rate.<sup>54</sup>

fusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper. Of course, the provision in section 22, as also the provision in section 9, must be read in connection with other parts of the act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the ab-

sence of an appropriate finding and order of the Commission. *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, *supra*, pp. 442, 446."

53. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075.

54. *United States*, *Dayton Coal & Iron Co. v. Cincinnati, N. O. & T. P. R. Co.*, 239 U. S. 446, 60 L. Ed. 375, 36 Sup. Ct. 137; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. Ed. 853, 35 Sup. Ct. 494, L. R. A. 1915E 665; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct.

Hence, an erroneous quotation of a rate by an agent of a carrier to a prospective patron binds neither shipper nor carrier as both are presumed in law to know the correct rate.<sup>55</sup> While this rule often results in undue

428; *Alabama Great Southern R. Co. v. George H. McFadden & Bros.*, 232 Fed. 1000; *Van Patten v. Chicago, M. & St. P. Ry. Co.*, 81 Fed. 545.

**Georgia.** *Seaboard Air-Line Ry. Co. v. Luke*, 19 Ga. App. 100, 90 S. E. 1041.

**Indiana.** *Cleveland, C., C. & St. L. Ry. Co. v. Talge Mahogany Co.*, — Ind. —, 112 N. E. 890.

**Iowa.** *Herminghausen v. Adams Exp. Co.*, 167 Iowa, 230, 149 N. W. 234.

**Kansas.** *Atchison, T. & S. F. Ry. Co. v. Superior Refining Co.*, 83 Kan. 732, 112 Pac. 604.

**New York.** *Pennsylvania R. Co. v. Titus*, 156 N. Y. App. Div. 830, 142 N. Y. Supp. 43; *Pennsylvania R. Co. v. Titus*, 78 N. Y. Misc. 347, 138 N. Y. Supp. 325; *Baltimore & O. R. Co. v. La Due*, 128 N. Y. App. Div. 594, 112 N. Y. Supp. 964.

**South Dakota.** *Great Northern Ry. Co. v. Loonan Lumber Co.*, 25 S. D. 155, 125 N. W. 644.

**Texas.** *Wichita Falls & W. Ry. Co. of Texas v. Asher*, — Tex. Civ. App. —, 171 S. W. 1114.

**Washington.** *Cœur d'Alene & S. R. Co. v. Union Pac. Co.*, 49 Wash. 244, 95 Pac. 71.

55. **United States.** *Illinois Cent. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. Ed. 681, 28 Sup. Ct. 428; *Hamlen & Sons v. Illinois Cent. R. Co.*, 212 Fed. 324; *Union Pac. R. Co. v. American Smelting & Refining Co.*, 121 C. C. A. 182, 202 Fed. 720; *Chesapeake & O. R. Co. v.*

*Hawkins*, 98 C. C. A. 443, 174 Fed. 597, 26 L. R. A. (N. S.) 309.

**Alabama.** *Central of Georgia R. Co. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Wolf*, 100 Ark. 22, Ann. Cas. 1913C 1384, 139 S. W. 536.

**Georgia.** *Central of Georgia R. Co. v. Curtis*, 14 Ga. App. 716, 82 S. E. 318; *Raleigh & G. R. Co. v. Swanson*, 102 Ga. 754, 39 L. R. A. 275, 28 S. E. 601.

**Iowa.** *Herminghausen v. Adams Exp. Co.*, 167 Iowa 230, 149 N. W. 234; *McManus v. Chicago Great Western R. Co.*, 156 Iowa 350, 136 N. W. 769.

**Kansas.** *Schenberger v. Union Pac. R. Co.*, 84 Kan. 79, 33 L. R. A. (N. S.) 391, 113 Pac. 433.

**Kentucky.** *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198; *Chesapeake & O. R. Co. v. Maysville Brick Co.*, 132 Ky. 643, 116 S. W. 1183.

**Louisiana.** *Louisiana Ry. & Nav. Co. v. Holly*, 127 La. 615, 53 So. 882.

**Massachusetts.** *New York, N. H. & H. R. Co. v. York & Whitney Co.*, 215 Mass. 36, 102 N. E. 366.

**Missouri.** *Sunderland Bros. Co. v. Baltimore & O. S. W. R. Co.*, 196 Mo. App. 154, 190 S. W. 650; *Sloop v. Delano*, 182 Mo. App. 299, 170 S. W. 385; *Sutton v. St. Louis & S. F. R. Co.*, 159 Mo. App. 685, 140 S. W. 76.

**New York.** *Pennsylvania R. Co. v. Titus*, 216 N. Y. 17, L. R. A. 1916 E 1127, 109 N. E. 857.

**North Carolina.** *Virginia-Carolina Peanut Co. v. Atlantic Coast*



hardship to a shipper who honestly and in good faith relies upon the statement of a carrier's agent as to the rate applicable to his shipment, its enforcement on the whole is beneficial in that it prevents all means of evading the published rate by pleading ignorance as an excuse.

The mistake of a carrier's agent, if binding upon the carrier, would afford opportunities for fraud and would tend to destroy the uniform operations of the published tariff. "For past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates. Stability and equality of rates are more important to commercial interests than reduced rates. It was instability and inequality that were the special evils to be remedied; it was the possibility that one shipper, in one way or another, whether by mistake or otherwise, could, and actually did, get a lower rate than another shipper that led to more stringent legislation. That evil the present

Line R. Co., 166 N. C. 62, 82 S. E. 1.

Oklahoma. Atchison, T. & S. F. Ry. Co. v. Ehret, — Okla. —, 152 Pac. 1107; St. Louis & S. F. R. Co. v. Pickens, — Okla. —, 151 Pac. 1055; St. Louis & S. F. R. Co. v. Walton-Chandler Lumber Co., 44 Okla. 452, 145 Pac. 340; Atchison, T. & S. F. R. Co. v. Bell, 31 Okla. 238, 38 L. R. A. (N. S.) 351, 120 Pac. 987; Atchison, T. & S. F. R. Co. v. Holmes, 18 Okla. 92, 90 Pac. 22.

Oregon. Zoller Hop Co. v. Southern Pac. Co., 72 Or. 262, 143 Pac. 931; Baldwin Sheep & Land Co. v. Columbia R. Co., 58 Or. 285, 114 Pac. 469.

Pennsylvania. Central R. Co. of New Jersey v. Mauser, 241 Pa. 603, 49 L. R. A. (N. S.) 92, 88 Atl. 791.

Texas. Wardlow v. Andrews, — Tex. Civ. App. —, 180 S. W. 1161; Wichita Falls & W. Ry. Co. of Texas v. Asher, — Tex. Civ. App. —, 171 S. W. 1114; Texas & P. R. Co. v. Leslie, 62 Tex. Civ. App. 380; 131 S. W. 824.

Vermont. Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76.

Washington. Southern Pac. Co. v. Frye & Bruhn, 82 Wash. 9, 143 Pac. 163; Fisher v. Great Northern R. Co., 49 Wash. 205, 95 Pac. 77.



amended statute meets in substantially the language of the previous legislation.<sup>56</sup>

§ 264. **Illustrative Cases Wherein the Foregoing Rule was Applied and Enforced.** The principle enunciated in the foregoing paragraph was applied by the courts under the following circumstances: a station agent erroneously quoted a rate of sixty-eight cents per hundred pounds on oranges when the rate on file was sixty-eight cents per crate of eighty pounds. The shipper paid the rate quoted and two months later the carrier discovered the mistake and brought suit for the difference. A recovery was permitted, the court stating that a rate was not the subject matter of a contract when filed and published with the Commission;<sup>57</sup> an agent's mistake in quoting a rate of sixty-eight dollars on a carload of baskets between two points in different states when in fact the published rate in the schedules filed with the Commission was \$114.00, did not bar the carrier from recovering the lawful rate. The act of the agent, it was held, did not create an estoppel against the carrier and prevent it from collecting the full legal rate;<sup>58</sup> a shipper, relying upon the statement of an agent that the rate on wheat from a station in Kansas to a point in Texas was thirty-one cents per hundred pounds, shipped two cars, but on delivery, a rate of forty-two cents per hundred pounds was collected, that being the rate published and filed. In an action for damages against the carrier for the agent's false statement, a recovery was denied because the published rate controlled;<sup>59</sup> in an action by a carrier for undercharge for a shipment from Columbus, Ga., to Birmingham, Ala., due to the failure of the carrier's agent to collect the lawful rate, the shipper pleaded a counterclaim alleging damages for the failure of the carrier to post the rates

56. *Poor Grain Co. v. Chicago, B. & Q. R. Co.*, 12 I. C. C. 418. 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28.

57. *Georgia R. R. v. Creety*, 5 Ga. App. 424, 63 S. E. 528. 59. *Schenberger v. Union Pac. R. Co.*, 84 Kan. 79, 33 L. R. A. (N. S.) 391, 113 Pac. 433.

58. *Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co.*,

in its station, but the court held that the defendant had no right of action against the carrier, irrespective of whether the lawful rate was posted or not;<sup>60</sup> an interstate carrier, fifteen months after a delivery of a shipment of peaches, discovered that the consignee was not charged the correct rate and brought an action for the balance. The error was due to a mistake in computing the freight charges. It was held that a recovery against the consignee was proper;<sup>61</sup> in another case it was held that an error of an agent in showing the shipper the wrong tariff sheet did not prevent the collection of the lawful rate;<sup>62</sup> in one case it was held that after a shipper had voluntarily paid the rate called for in the shipping contract, the carrier could not thereafter recover the difference between the contract rate and the scheduled rate for the reason that both shipper and carrier were presumed to know the published rate and an agreement to carry at less than the published rate was illegal and therefore both parties were in *pari delicto* and a recovery for the difference could not be had,<sup>63</sup> but this decision is contrary to the controlling decisions of the federal courts in construing the Interstate Commerce Act.<sup>64</sup>

**§ 265. Defense of Estoppel to Actions Against Shippers for Undercharges.** The defense of waiver or estoppel is not available in actions by common carriers against shippers for undercharges. Thus, where a shipper paid one sum for the transportation of goods from a point in one state to a point in another and thereafter the carrier discovered that the proper charges had not

60. *Central of Georgia R. Co. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 So. 202, in which the court cited *St. Louis Southwestern R. Co. v. Burkett*, 229 U. S. 603, 57 L. Ed. 1347, 33 Sup. Ct. 773; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Illinois Cent. R. Co. v. Henderson*

*Elevator Co.*, 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176.

61. *Pennsylvania R. Co. v. Titus*, 216 N. Y. 17, L. R. A. 1916E 1127, 109 N. E. 857.

62. *Sloop v. Delano*, 182 Mo. App. 299, 170 S. W. 385.

63. *Southern Pac. Co. v. Frye & Bruhn*, 82 Wash. 9, 143 Pac. 163.

64. See cases in notes to preceding section.

been collected and that a balance was due, the shipper could not set up as a defense the delay of the carrier in collecting the balance due and the fact that the purchasers of the goods had become insolvent so that the freight charges could not be collected from them.<sup>65</sup> "Appellant has cited no authority," said the court, "holding that estoppel as a defense could be pleaded against a demand for the charges fixed by law for an interstate shipment; nor has any authority, on an analogous principle been cited; nor have we found any which would justify us in so holding. The nearest approach to an authority holding in effect that estoppel will lie in cases of the character here under consideration is *Yazoo & M. V. R. R. Co. v. Zemurray*, 238 Fed. 789, 151 C. C. A. 639. But in that case the court expressly stated that no feature of any interstate commerce law was involved, and the case was controlled by the statute of limitations. To hold that the carrier can do indirectly that which it cannot do directly is wholly inconsistent with the letter and the spirit of that part of the Interstate Commerce Act, and its various amendments, regulating interstate rates of common carriers. In *L. & N. R. R. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665, plaintiff sued for the difference in the price of some passenger tickets from Nashville, Tenn., to Salt Lake City as fixed by the Interstate Commerce Commission and the price sold at by plaintiff. Judgment went for defendant in the state courts of Tennessee, and the case was taken to the Supreme Court of United States by writ of error. In reversing the case Mr. Justice Hughes said: 'Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not

65. *Bush v. Keystone Driller Co.*, — Mo. App. — 199 S. W. 597.



an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.' *Central of Georgia Ry. Co. v. Birmingham Sand & Brick Co.*, 9 Ala. App. 419, 64 South. 202, is directly to the point. There an error was made in estimating freight on interstate shipments, and suit brought for the difference between the lawful rate and the amount collected. The defense was facts tending to establish estoppel; as in the instant case. The court in that case held that estoppel would not lie, and in disposing of the matter used this language, which we think clearly reflects the spirit of the act of Congress regulating interstate rates: 'The necessary effect of all these decisions, construing and applying the Interstate Commerce Act, when considered together is, in our opinion, that the carrier cannot, by any act, estop itself from exacting the lawful freight rate. If the carrier could so estop itself, then it would lie within the carrier's power, by purposely putting itself in a position where it could not exact the lawful rate of a shipper it desired to favor, to render nugatory one of the main designs of the act, the prevention of discrimination between shippers; and for the law to countenance the doctrine of estoppel in cases like this is for the law to say through the courts that the carrier is estopped from doing what the statute mentioned plainly requires that it must do—collect the lawful rate in all cases, and nothing greater and nothing less, by any means or device whatsoever. We cannot escape the conclusion that Congress impliedly intended by the act mentioned to deny to consignors and consignees the defense of estoppel when sued by the carrier for the lawful rate, since such a defense is entirely inconsistent with and destructive of the purposes of the act.' It follows from the above and foregoing that the defense of estoppel in our judgment is not available in the instant case, and that the trial court was correct in sustaining plaintiff's demurrer to that portion of the



answer pleading estoppel, and in sustaining the objection of plaintiff's offering to prove that the letter and spirit of the Interstate Commerce Act, regulating interstate rates, could be side-stepped and avoided by pleading estoppel as in counterclaim or set-off, and in principle we can see no difference in the ultimate effect."

**§ 266. Penalty for Making Erroneous Quotation of Rate When Shipper is Damaged Thereby.** The burden of placing upon a shipper the duty of ascertaining for himself at his peril, the scheduled rate, and to suffer the financial consequences if, relying upon the carrier, the agent should erroneously quote a lower rate to him, presented a situation that seemed irremediable; for, if redress were allowed the shipper for an erroneous quotation of a rate, it would open a way for the allowance of secret rebates in such a manner as to be practically not provable in criminal proceedings. On the other hand, many shippers, owing to inexperience, and the complexity and voluminousness of railroad tariffs, are unable to determine and ascertain a rate covering particular shipments. But a carrier's agent, skilled and experienced in the business, should be able to know the scheduled rate.

For the purpose of compelling carriers to exercise greater care in the quotation of rates, the amendment of 1910 to Section 6 was passed.<sup>66</sup> This amendment pro-

66. "Upon first thought, it shocks one's sense of fairness to know that the requirements of the law are such that the shipper, who, although charged by the law with knowledge of the filed and published rates, it is known in most instances, has no knowledge of the rates prescribed by the filed and published tariffs, and because of his lack of experience in such matters, is unable to determine from such schedules the freight rate in any given case, and who, therefore, is in a large measure dependent upon the information

that he can obtain from the agent of the carrier negligently, has no remedy against the carrier to enforce his contract, when he has been given an incorrect rate by the agent of a carrier, based upon which he has made contracts and suffers damages thereby. But Congress, no doubt, considered that it was better that the few cases of injustice that might arise from this source had better occur than that the opportunity for evading the law and permitting rebating and favoritism in rates under the plea of mistakes of the

vides that "If any common carrier subject to the provisions of this Act, after written request made upon the agent of such carrier hereinafter in this section referred to, by any person or company for a written statement of the rate or charge applicable to a described shipment between stated places under the schedules or tariffs to which such carrier is a party, shall refuse or omit to give such written statement within a reasonable time, or shall misstate in writing the applicable rate, and if the person or company making such request suffers damage in consequence of such refusal or omission or in consequence of the misstatement of the rate, either through making the shipment over a line or route for which the proper rate is higher than the rate over another available line or route, or through entering into any sale or other contract whereunder such person or company obligates himself or itself to make such shipment of freight at his or its cost, then the said carrier shall be liable to a penalty of two hundred and fifty dollars, which shall accrue to the United States and may be recovered in a civil action brought by the United States. It shall be the duty of every carrier by railroad to keep at all times conspicuously posted in every station where freight is received for transportation the name of an agent resident in the city, village, or town where such station is located, to whom application may be made for the information by this section required to be furnished on written request; and in case any carrier shall fail at any time to have such name so posted in any station, it shall be sufficient to address such request in substantially the following form: 'The Station Agent of the ..... Company at ..... Station,' together with the name of the proper post office, inserting the name of the carrier company and of the station in the blanks, and to serve the same by depositing the request so addressed, with postage thereon prepaid, or any post office."

agents, a different rule would afford, should obtain." Atchison, *l.* 38 L. R. A. (N. S.) 351, 120 Pac. 987.  
& *S. F. R. Co. v. Bell*, 31 Okla. 238,

§ 267. **In Actions to Collect Scheduled Rates Counterclaims for Damages to Goods Prohibited.** Every device and subterfuge which in any manner might permit any discrimination between shippers, is prohibited. The purpose of Congress in the adoption of the Interstate Commerce Act was to cut up, by the roots, every form of discrimination, favoritism and inequality.<sup>67</sup> Carriers cannot, therefore, accept any compensation other than cash for interstate transportation.<sup>68</sup> Applying these rules in actions for the collection of freight charges, the courts have held that a shipper cannot refuse to pay the schedule rates for transportation because of a claim for damages to the goods shipped. In view of the purpose and spirit of the act, a counterclaim of such a nature in an action to enforce the payment of freight charges, would pave the way and open the door to an insidious method of rebating.<sup>69</sup> "If the defendant in this action has a valid claim for damages, both parties should be permitted to exercise their right to compromise the action; but, if such compromise were effected in a transaction involving the collection of freight charges, the court would be compelled to supervise it with the utmost care, in order, as Judge Munger expresses it, 'to prevent the granting and receiving of rebates by insidious agreement between the parties.' So important is it that the collection of freight charges should be uniform as to all shippers, so important is it that it be above suspicion of favoritism, that I feel that it is against public policy to permit a counterclaim of this kind to be pleaded, and the counterclaim will be stricken out."<sup>70</sup>

§ 268. **Damages Not Recoverable for Failure to Post Rates at Stations.** As the requirement of the stat-

67. *Louisville & N. R. Co. v. Mottley*, 216 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671.

68. *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272.

69. *Chicago & N. W. Ry. Co. v. William S. Stein Co.*, 233 Fed. 716; *Illinois Cent. R. Co. v. W. L. Hoopes & Sons*, 233 Fed. 135.

70. *Judge Wade in Illinois Cent. R. Co. v. W. L. Hoopes & Sons*, *supra*.



ute that tariffs must be kept posted in depots and stations was intended as a means of affording special facilities to the public for ascertaining rates actually in force and not as a condition upon which the legal operation of a tariff must depend, the failure of a carrier to obey all law in this respect does not invalidate the tariff when it has been properly filed with the Commission.<sup>71</sup> A failure to post the tariffs in stations will subject the carrier to the penalties provided by the statute;<sup>72</sup> but notwithstanding the provisions of section 8 prescribing that if any carrier shall do or omit to do any act, matter or thing required by the statute to be done, such carrier shall be liable in damages to the person injured thereby, a shipper cannot recover for loss sustained by a carrier's failure to post a tariff in accordance with the requirements of the act and the Commission's regulations thereunder, although the tariff had been lawfully filed with the Commission.<sup>73</sup>

71. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 51 L. Ed. 562, 27 Sup. Ct. 358; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628.

72. *Franke Grain Co. v. Illinois Cent. R. Co.*, 27 I. C. C. 625, in which the Commission said: "Section 6 provides that schedules of rates shall be plainly printed in large type, and that copies for the use of the public shall be kept posted in every depot, station, or office of such carrier where passengers or freight respectively are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. This section gives the Commission certain discretion to modify the provision as to posting. Under the rules of the Commission, however, every carrier must keep on file, subject

to public inspection at stations where property is received for transportation, its current rates from such stations. Under these rules the Soo line was under requirement to have on file at Milwaukee the rates here involved. The Elkins Act provides that a fine of not less than \$1,000 nor more than \$20,000 shall be incurred by any carrier failing to publish its rates in the manner provided above. The Commission will request the prompt prosecution of carriers who fail to meet the above requirements of the law. It will make investigations on its own account to determine the state of tariff files at stations, and will receive and act upon information from any person having knowledge of such failure."

73. *United States. Franke Grain Co. v. Illinois Cent. R. Co.*, 27 I. C. C. 625.

*Alabama. Northern Alabama R. Co. v. Wilson Mercantile Co.*, 9



Formerly the Interstate Commerce Commission and some courts held that damages could be recovered because of a failure to file and keep open for public inspection at stations the established rates even though the shipper thereby indirectly received a *quasi* rebate from the established rate.<sup>74</sup> These rulings were, however, in effect, overruled by the Supreme Court in the case cited in the notes,<sup>75</sup> in which the Court said: "The Henderson Elevator Company, defendant in error, as plaintiff below brought this action to recover damages from the Railroad Company, the plaintiff in error, because of a loss alleged to have been sustained by an erroneous quotation by the agent of the Railroad Company of the freight rate on corn shipped in interstate commerce from the station of the Railroad Company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent when in fact the rate as fixed by the published tariff on file with the Interstate Commerce Commission and effective at the time was 13½ cents per hundred pounds. On the trial before a jury the court instructed that if the loss sustained by the plaintiff 'was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Kentucky, its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains, . . .' there should

Ala. App. 269, 63 So. 34; Louisville & N. R. Co. v. McMullen, 5 Ala. App. 662, 59 So. 683.

**Kentucky.** Louisville & N. R. Co. v. Allen, 152 Ky. 145, 153 S. W. 198.

**Missouri.** Mott Store Co. v. St. Louis & S. F. R. Co., 184 Mo. App. 50, 168 S. W. 322; Mires v. St. Louis & S. F. R. Co., 134 Mo. App. 379, 114 S. W. 1052.

**South Carolina.** Southern Ry. Co. v. Wilmont Oil Mills, 105 S. C. 51, 89 S. E. 476.

**Texas.** Wardlow v. Andrews,

— Tex. Civ. App. —, 180 S. W. 1161.

74. St. Louis Southwestern R. Co. of Texas v. Lewellen Bros., 113 C. C. A. 414, 192 Fed. 540; Kiel Woodenware Co. v. Chicago, M. & St. P. Ry. 18 I. C. C. 242; Illinois Cent. R. Co. v. Henderson Elevator Co., 138 Ky. 220, 127 S. W. 779; Wabash R. Co. v. Sloop, 200 Mo. 198, 98 S. W. 607.

75. Illinois Cent. R. Co. v. Henderson Elevator Co., 226 U. S. 441, 57 L. Ed. 290, 33 Sup. Ct. 176.

be a verdict for the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction and the judgment entered thereon having been subsequently affirmed by the Court of Appeals of Kentucky (138 Kentucky, 220), this writ of error was sued out. It is to us clear that the action of the court below in affirming the judgment of the trial court and the reasons upon which that action was based were in conflict with the rulings of this court interpreting and applying the Act to Regulate Commerce. *New York Cent. R. R. v. United States* (No. 2), 212 U. S. 500, 504; *Texas & Pacific R. R. Co. v. Mugg*, 202 U. S. 242; *Gulf Railroad Co. v. Hefley*, 158 U. S. 98. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. *Kansas City So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, 594 (a).''

**§ 269. Rule Stated in Foregoing Paragraph Illustrated in Adjudicated Cases.** The following are illustrative applications to concrete cases of the foregoing rule: a shipper's agent, upon applying to a carrier for the rate on corn from a point in Iowa to a point in Wisconsin, was shown a tariff which fixed a rate of 14.75 cents per 100 pounds upon which the shipper relied and shipped a carload. The tariff shown him, however, had been canceled and the rate between the two points in the established tariff was 21.75 cents; but this new tariff had not been posted at the station from which the grain was shipped. Upon a complaint for reparation because of a failure to post the new rate, a recovery was denied.<sup>76</sup> In a carrier's action against a shipper for a sum of money alleged to be due it on account of undercharges made by it to him in the shipment of interstate freight, the shipper claimed that the rate established in the schedules and filed with the Commission was not effective because not posted in the stations as required by law; but the court held that the posting was no part of the

76. *Franke Grain Co. v. Illinois Cent. R. Co.*, 27 I. C. C. 625.

establishment of the rate and that the shipper was liable.<sup>77</sup>

**§ 270. Shipper May Recover Damages for Collection of Rate in Excess of that Fixed by Schedule.** A carrier may not collect higher charges than those prescribed in the tariffs, for a carrier fixes its own rate by filing the required schedule. The rate thus filed becomes the lawful rate and must be deemed to be reasonable unless attacked on that ground before the Interstate Commerce Commission. The acceptance of a greater or a less rate or charge constitutes an unlawful act. If, therefore, the carrier exacts more than the scheduled rate, the shipper sustains thereby a loss which is the difference between the scheduled rate and the rate he was actually charged. As he is entitled to transportation at the lawful rate as fixed by the tariff, he may, therefore, recover any amount paid in excess of the published rate.<sup>78</sup>

**§ 271. Nothing but Money May be Lawfully Received for Transportation of Either Passengers or Property.** The statute declares it to be an unjust and unlawful discrimination for any carrier subject to the provisions of the Act to receive from any person "a greater or less compensation" for any service rendered in the transportation of property or persons than is received from any other person under like circumstances. This provision of the statute was supplemented by the amendment of 1906 to section 6 which provides that no carrier shall receive "a greater or less or different compensation" for the transportation of persons or property. It follows that nothing but money can be lawfully received or accepted by interstate carriers in payment for transportation, whether of passengers or property, or for any service connected therewith.

77. *Louisville & N. R. Co. v. Feintuch*, 112 C. C. A. 126, 191 Allen, 152 Ky. 145, 153 S. W. 198. Fed. 482.

78. *Chicago, B. & Q. R. Co. v.*



A contract, therefore, between an interstate carrier and a passenger injured in a wreck whereby the passenger releases the carrier from all damages on account of its negligence, in consideration of the issuance of a pass to the passenger, providing for free transportation for him for the remainder of his life over the line of the carrier, is invalid in that it provides that the carrier shall receive a different compensation for transportation in violation of the statute.<sup>79</sup> Similarly, a contract between a publisher and an interstate carrier whereby the carrier agreed to accept advertisements in a magazine in payment for transportation for the use of the publisher, his employes and members of his family, was held to be void.<sup>80</sup> "The legislative department," said the Court in the last case cited, "intended that all who obtained transportation on interstate lines should be treated alike in the matter of rates and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money." Contracts of a similar nature have been frequently condemned.<sup>81</sup>

**§ 272. Acceptance of Promissory Notes in Payment for Freight Charges Unlawful.** The statute prohibits all carriers from collecting or receiving a greater or less or different compensation for transportation or any service connected therewith than the rates, fares and charges which are specified in the tariffs filed with the Commission. Congress intended in the passage of the statute

79. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671.

80. *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272.

81. *Fourche River Lumber Co. v. Bryant Lumber Co.*, 230 U. S. 316, 57 L. Ed. 1498, 33 Sup. Ct.

887; *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *United States v. Garbish*, 222 U. S. 257, 56 L. Ed. 190, 32 Sup. Ct. 77; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515, 26 Sup. Ct. 272.



that all persons obtaining transportation from interstate carriers should be on a plane of equality. The purpose of the statute cannot be met except by requiring that transportation be paid for in money.<sup>82</sup> It is, therefore, unlawful for a carrier to receive in payment for transportation services a promissory note as it is a different compensation from that which the law authorizes, namely, money.<sup>83</sup>

**§ 273. Separately Established Rates must be Published in Absence of Joint Rates over Through Route.** The statute provides that if no joint rate over a through route has been established, the several carriers in such through route must file, print and keep open to public inspection, the separately established rates, fares and charges applicable to the through transportation. When, therefore, an interstate shipment of merchandise passes from the point of origin to the point of destination over the lines of two separate carriers, and a joint rate over said lines has not been filed and published in the manner required by the statute, the lawful rate to be applied to such a movement is the published tariff rate of the first carrier from the point of origin to the point of connection with the second carrier and the published tariff rate of the second carrier from the point of connection with the first carrier and the point of destination.<sup>84</sup> It is competent, however, for carriers, if conditions justify, to make their proportions of a through rate less than the local charges upon their own lines; but in so doing, they must publish the rates in conformity with the provisions of the statute. If not published, the carriers must adhere to the rates established, published and filed by them as applied not only to local but to through

82. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671; See *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486, 55 L. Ed. 305, 31 Sup. Ct. 272.

83. *United States v. Sunday Creek Co.*, 194 Fed. 252.

84. *Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; *United States v. Camden Iron Works*, 150 Fed. 214;

traffic.<sup>85</sup> The policy of the law is that every route and every service shall have a published rate clearly known and available to all patrons of the carrier.

**§ 274. When Through Rate is Made up of Sum of Locals, Rates in Effect on Date of Shipments Apply.** When through billing is given by an initial carrier to destination on the line of a connecting carrier, there is in existence a through route over which a through rate applies. When such a rate is made up of the sum of the locals, the locals apply as of the date of shipment. Any decrease or increase made after the date of the shipment is not applicable to such through shipments; for tariffs cannot be given a retroactive effect and be made to apply to conditions other than those existing on the date when such tariffs became effective.

A combination through rate is as binding, definite and absolute as a joint through rate, and all the conditions, regulations and privileges obtaining as to any factor in such combination rate or through shipment at the time of initial shipment upon such combination through rate, must be adhered to and cannot be varied as to that shipment during the transit to its final destination. A local or proportional rate "in" cannot be absorbed, diminished or affected by any "out" rate not in effect at the time when the traffic moved upon such local or proportional rate.<sup>86</sup>

**§ 275. Departures from Published Tariffs Permitted in Performance of Private Duties of Carriers.** The provisions of the statute prohibiting departures from published tariffs are not binding upon a railroad company when it is acting outside the performance of its duties as a common carrier. Thus, a carrier having entered into a contract with a construction company for

United States v. Wood, 145 Fed. 405.

85. Chicago, B. & Q. R. Co. v. United States, 85 C. C. A. 194, 157 Fed. 830, aff'd in 209 U. S. 90, 52

L. Ed. 698, 28 Sup. Ct. 439.

86. Liberty Mills v. Louisville & N. R. Co., 23 I. C. C. 182; In re Through Routes and Through Rates, 12 I. C. C. 163.

the grading of a new branch line, agreed to transport the supplies, camp and grading outfit and the employes of the construction company at less than the rates and fares fixed in the published tariffs of the carrier. Such a contract, when entered into in good faith and not as a subterfuge, is not a violation of the statute penalizing departures from the published schedules.<sup>87</sup> There are many special arrangements which are not embraced within the railroad company's duty as a common carrier, although their performance may incidentally involve the actual transportation of persons and things, whose carriage in other circumstances might be within the carrier's public obligation.<sup>88</sup>

**§ 276. Rates for Passage of Vehicles on Railroad Ferries Must be Filed.** All rates of common carriers by railroad no matter for what service performed, are within the purview of Section 6. Transportation by ferries, when owned by common carriers by railroad and in connection with railroad operation, is under the control of the Commission.<sup>89</sup> Frequently in addition to transporting passengers and freight in connection with their rail lines, carriers use their ferries for the purpose of transporting vehicles and passengers having no connection with their rail lines. If interstate in character, vehicular ferry rates and fares not made in connection with rail lines must also be filed with the Commission under the provisions of Section 6.<sup>90</sup>

87. *Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co.*, 228 U. S. 177, 57 L. Ed. 787, 33 Sup. Ct. 474; *In re Railroad-Telegraph Contracts*, 12 I. C. C. 10.

88. *Northern Pac. R. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. 408; *Baltimore &*

*O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. 385; *Long v. Lehigh Valley R. Co.*, 65 C. C. A. 354, 130 Fed. 870.

89. Section 93, *supra*.

90 *New York-Jersey City Ferry Rates*, 37 I. C. C. 103.

## CHAPTER XIV

### DAMAGES OR REPARATION FOR VIOLATIONS OF COMMERCE ACT— JURISDICTION OF COURTS AND COMMISSION.

- Sec. 277. Statutory Provision Creating Civil Liability for Damages Due to Violation of Interstate Commerce Act
- Sec. 278. Statutory Authority of Commission and Courts to Award Damages for Violation of Act.
- Sec. 279. Commission Without Authority to Award Damages Prior to Amendment of 1889.
- Sec. 280. Award of Damages by Commission for Unlawful Discrimination—Former and Present Rule.
- Sec. 281. Authority of Commission to Award Damages Extends Only to Violations of Act to Regulate Commerce.
- Sec. 282. Conflicting Provisions Harmonized and Exclusiveness of Remedy before Commission, in Certain Cases, Established.
- Sec. 283. Courts Without Primary Jurisdiction to Award Damages for Exaction of Excessive Interstate Rates.
- Sec. 284. But Actions for Overcharges Exceeding Scheduled Rates may be Prosecuted in Courts without Previous Determination of Commission.
- Sec. 285. Suits for Damages Recoverable Under Section 8 Cannot be Prosecuted in State Courts.
- Sec. 286. Damages Caused by Unjust Discrimination, Preliminary Order of Commission Essential, When.
- Sec. 287. Original Jurisdiction of State Courts to Award Damages Against Interstate Carriers not Wholly Superseded.
- Sec. 288. In Actions for Damages for Violation of Statute Pecuniary Loss Must be Shown.
- Sec. 289. Measure of Damages for Unreasonable Rates and Unlawful Discriminations.
- Sec. 290. Parties Entitled to Damages for Excessive Freight Charges—Consignors and Consignees.
- Sec. 291. Right of Shipper to Reparation When Arbitrary Sum is Added to Sale Price to Cover Excessive Charges.
- Sec. 292. Foregoing Principle Approved by Federal Supreme Court—Southern P. Co. v. Darnell-Taenzer Lumber Co.
- Sec. 293. Reparation on Past Shipments not Automatically Awarded on Finding that Rate is Excessive.
- Sec. 294. Damages Growing out of Inadequate Service or Facilities.
- Sec. 295. Damages for Misrouting Shipments May be Awarded by Commission, When.
- Sec. 296. Reparation Awarded by Commission for Overcharges a Bar to Subsequent Action for Additional Damages.
- Sec. 297. Findings of Commission on Reasonableness of Rates Inure to Benefit of Every Person Paying the Unjust Rate.



- Sec. 298. Findings of Fact Required When Commission Awards Damages Against a Carrier.
- Sec. 299. Statute Prescribing Findings and Orders of Commission Prima Facie Evidence of Facts Therein Stated, Constitutional.
- Sec. 300. Commission May Order Reparation without Prescribing Maximum Rate to be Observed in the Future.
- Sec. 301. Actions to Enforce Orders of Commission Awarding Damages may be Prosecuted in State as well as Federal Courts.
- Sec. 302. Complaints for Damages before Commission must be Filed within Two Years.
- Sec. 303. Assignability of Claims for Damages under the Interstate Commerce Act.
- Sec. 304. Allowance of Attorney's Fees for Services in Reparation Cases Before Commission not Permitted.

**§ 277. Statutory Provision Creating Civil Liability for Damages Due to Violation of Interstate Commerce Act.** Every common carrier subject to the provisions of the Interstate Commerce Act that shall do, cause to be done, or permit to be done, any act, matter or thing, prohibited by the Act to Regulate Commerce, or declared therein to be unlawful, or shall omit to do any act, matter or thing in such statute required to be done, shall be liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of the statute, together with a reasonable attorney's fee to be fixed by the court, in every case of recovery, which may be taxed and collected as a part of the costs in each case. Such, in substance, is the provision of Section 8 of the Interstate Commerce Act. It has not been amended since its enactment as a part of the original act in 1887.

**§ 278. Statutory Authority of Commission and Courts to Award Damages for Violation of Act.** Every person claiming to be damaged by any common carrier subject to the statute may either make complaint to the Interstate Commerce Commission or may bring suit for the recovery of damages for which a common carrier may be liable under the provisions of the Interstate Commerce Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both of such remedies and

must, in each case, elect which one of the two methods he will pursue.<sup>1</sup>

The procedure for damages before the Commission is governed by sections 13, 14 and 16 of the Act. If, after a hearing upon a complaint made as provided by section 13, the Interstate Commerce Commission, in a proceeding instituted before it, shall determine that any party is entitled to an award of damages under the provisions of the Act for a violation thereof, the Commission is required to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named in the order. If a carrier does not comply with an order for the payment of money within the time specified in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the things for which he claims damages and the order of the Commission in the premises. Such suits in the district court of the United States shall proceed in all respects like other civil suits for damages except that, on the trial of such suits, the findings and orders of the Commission shall be *prima facie* evidence of the facts therein stated. The petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceeding unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. In such suits all parties in whose favor the Commission may have made an award for damages by a single order, may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages, may be joined as defendants. Such a suit may be maintained by such joint plaintiffs and

1. Section 9 of the Act to Regulate Commerce, appendix A, *infra*.

against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants, and service of process against any one of such defendants as may not be found in the district where the suit is brought, may be made in any district where such defendant carrier has its principal operating office. In such joint suits the recovery, if any, may be by judgment in favor of any one of such plaintiffs against the defendant found to be liable to such plaintiff.

Every order of the Commission awarding damages may be served upon the designated agent of the carrier in the city of Washington, D. C., or upon such other one as may be provided by law. The Commission is authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.<sup>2</sup> Whenever an investigation shall be made by the Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises, and in case damages are awarded, such report shall include the findings of facts on which the award is made.<sup>3</sup> Nothing in the Act to Regulate Commerce shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the Interstate Commerce Act are in addition to such remedies.<sup>4</sup>

**§ 279. Commission Without Authority to Award Damages Prior to Amendment of 1889.** Prior to the amendment of 1889 no provision was incorporated in the statute for enforcing the orders of the Commission in the matter of reparation for past damages. When the question involved is one of reparation for past damages, the constitutional right to a trial by jury exists under

2. Section 16 of the Act to Regulate Commerce, Appendix A, *infra*.

3. Section 14 of the Act to Reg-

ulate Commerce, Appendix A, *infra*.

4. Section 22 of the Act to Regulate Commerce, Appendix A, *infra*.



the seventh amendment to the federal constitution, and, as the statute made no provision for a jury trial as originally enacted, the Commission, in several cases, declined to make an award of damages.<sup>5</sup> But the amendment of 1889 contained a provision giving a jury trial in the federal court when the matter involved in any order entered by the Commission was founded upon a controversy requiring a trial by jury. Since that time the Commission has entertained jurisdiction of claims for damages due to a violation of the statute.<sup>6</sup>

**§ 280. Awards of Damages by Commission for Unlawful Discrimination—Former and Present Rule.** Notwithstanding the acknowledged powers of the Commission under the Act to Regulate Commerce as amend-

5. *Riddle, Dean & Co. v. New York, L. E. & W. R. Co.*, 1 I. C. C. 594; *Heck v. East Tennessee, V. & G. Ry. Co.*, 1 I. C. C. 495.

6. *St. Louis Blast Furnace Co. v. Virginian Ry. Co.*, 21 I. C. C. 215; *Parfrey v. Chicago, M. & St. P. Ry. Co.*, 20 I. C. C. 104; *Steinfeld & Co. v. Illinois Cent. R. Co.*, 20 I. C. C. 12; *Texas Grain & Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, 18 I. C. C. 580; *Stacy Mercantile Co. v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 18 I. C. C. 550; *De Bary & Co. v. Louisiana W. R. Co.*, 18 I. C. C. 527; *Maris v. Southern P. Co.*, 18 I. C. C. 301; *Delray Salt Co. v. Pennsylvania R. Co.*, 18 I. C. C. 259; *American Creosote Works v. Illinois Cent. R. Co.*, 18 I. C. C. 212; *Kindleton v. Southern P. Co.*, 17 I. C. C. 251; *Beekman Lumber Co. v. Chicago, R. I. & P. Ry. Co.*, 16 I. C. C. 528; *Carstens Packing Co. v. Chicago, M. & St. P. Ry. Co.*, 16 I. C. C. 469; *Sunderland Bros. Co. v. Pere Marquette R. Co.*, 16 I. C. C. 450; *Wells-Higman Co. v. Grand Rapids & I. Ry. Co.*, 16 I.

*C. C.* 339; *Gilchrist v. Lake Erie & N. R. Co.*, 16 I. C. C. 318; *Allen & Co. v. Chicago, M. & St. P. Ry. Co.*, 16 I. C. C. 293; *Diehl v. Chicago, M. & St. P. Ry. Co.*, 16 I. C. C. 190; *Hardenberg, Dolson & Gray v. Northern P. Ry. Co.*, 14 I. C. C. 579; *Carstens Packing Co. v. Northern P. Ry. Co.*, 14 I. C. C. 577; *Sylvester v. Pennsylvania R. Co.*, 14 I. C. C. 573; *Wilson v. Chicago, M. & St. P. Ry. Co.*, 14 I. C. C. 549; *McCaull-Dinsmore Co. v. Chicago G. W. Ry. Co.*, 14 I. C. C. 527; *Slimmer & Thomas v. Chicago, St. P., M. & O. Ry. Co.*, 14 I. C. C. 525; *Gamble-Robinson Com. Co. v. Northern P. Ry. Co.*, 14 I. C. C. 523; *California Commercial Ass'n v. Wells, Fargo & Co.*, 14 I. C. C. 422; *Flint & Walling Mfg. Co. v. Lake Shore & M. S. Ry. Co.*, 14 I. C. C. 336; *Nicola, Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199; *Erie Preserving Co. v. Lake Shore & M. S. Ry.*, 14 I. C. C. 118; *Laning-Harris Coal & Grain Co. v. Missouri P. Ry. Co.*, 13 I. C. C. 154; *Poor Grain Co. v. Chicago, B. & Q. R. Co.*, 12 I. C.



ed in 1906, the Commission held in 1909<sup>7</sup> that damages arising out of unlawful discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, were cognizable only in the courts, and that the jurisdiction of the Commission extended only to rate or transportation damages, that is, such damages as grow out of the collection by carriers of excessive rates. Shortly after the Commission made its report in the *Joynes* case, a federal circuit court dismissed an action for damages alleged to have been sustained by a shipper on account of unlawful discrimination in the distribution of coal cars on the ground that the Commission alone could primarily entertain a claim of that nature.<sup>8</sup> When this decision was handed down, the Commission then reluctantly overruled its former decision and held that its power to award damages under section 9 of the act included "general" damages as well as "rate" damages due to a violation of any of the provisions of the Act.<sup>9</sup>

The power of the Commission to award damages for unlawful discriminations in violation of the Interstate Commerce Act has since been affirmed by the United States Supreme Court,<sup>10</sup> and has been exercised

C. 418; *American Grass Twine Co. v. Chicago, St. P. M. & O. Ry. Co.*, 12 I. C. C. 141; *Frederick Brick Works v. Northern C. Ry. Co.*, 12 I. C. C. 13; *MacLoon v. Chicago & N. W. Ry. Co.*, 5 I. C. C. 84.

7. *Joynes v. Pennsylvania R. Co.*, 7 I. C. C. 361.

8. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 176 Fed. 748, in which the court cited: *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075.

9. *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 23 I. C. 186; *Bulah Coal Co. v. Pennsylvania R.*

*Co.*, 20 I. C. C. 52; *Jacoby & Co. v. Pennsylvania R. Co.*, 19 I. C. C. 392; *Hillsdale Coal & Coke Co. v. Pennsylvania R. Co.*, 19 I. C. C. 356.

10. *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. 46; *Pennsylvania R. Co. v. W. F. Jacoby & Co.*, 242 U. S. 89, 61 L. Ed. 165, 37 Sup. Ct. 49; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

by the Commission in many cases.<sup>11</sup> "The Commission also had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint. We deem the provisions of the Act to be clear upon this point. See sections 8, 9, 13, 16. There is nothing in the Act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of section three, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the Act and their ascertainment is within the scope of the Commission's authority."<sup>12</sup>

**§ 281. Authority of Commission to Award Damages Extends Only to Violations of Act to Regulate Commerce.** The authority of the Interstate Commerce Commission to award damages extends only to such damages as accrue from violations of the Interstate Commerce Act.<sup>13</sup> The Commission has never assumed jurisdiction

11. *Sloss-Sheffield Steel & Iron Co. v. Louisville & N. R. Co.*, 40 I. C. C. 743; *Manufacturers' & Merchants' Ass'n v. Aberdeen & A. R. Co.*, 37 I. C. C. 350; *Spiegle v. Southern Ry. Co.*, 32 I. C. C. 687; *Curry & Whyte Co. v. Duluth & I. R. R. Co.*, 32 I. C. C. 162; *Curry & Whyte v. Duluth & I. R. R. Co.*, 30 I. C. C. 1; *New Orleans Board of Trade v. Illinois Cent. R. Co.*, 29 I. C. C. 32; *Eichenberg v. Southern P. Co.*, 28 I. C. C. 584; *Wisconsin Lime & Cement Co. v. Cleveland, C. C. & St. Ry. Co.*, 25 I. C. C. 366.

12. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896.

13. *Southwestern Portland Cement Co. v. Texas & P. Ry. Co.*,

41 I. C. C. 39; *Vulcan Coal & Mining Co. v. Illinois Cent. R. Co.*, 32 I. C. C. 52; *Atlas Portland Cement Co. v. Lehigh Valley R. Co.*, 32 I. C. C. 487; *United States v. Union P. R. Co.*, 28 I. C. C. 518; *Hampton Mfg. Co. v. Old Dominion S. S. Co.*, 27 I. C. C. 666; *Ralston Townsite Co. v. Missouri P. Ry. Co.*, 22 I. C. C. 354; *Kay Co. v. Denver & R. G. R. Co.*, 21 I. C. C. 239; *Maxwell v. Wichita Falls & N. W. Ry. Co.*, 20 I. C. C. 197; *Hanley Milling Co. v. Pennsylvania Co.*, 19 I. C. C. 475; *Memphis Freight Bureau v. Kansas City S. Ry. Co.*, 17 I. C. C. 90; *Falls & Co. v. Chicago, R. I. & P. Ry. Co.*, 15 I. C. C. 269; *Royal Brewing Co. v. Adams Exp. Co.*, 15 I. C. C. 255; *General Elec. Co. v. New York Cent. & H. River R. Co.*, 14 I. C. C. 237; *La*

to award damages over loss and damage claims not arising from any duty imposed upon the carriers by the Act to Regulate Commerce, such as destruction of property from accident, loss by stealing or fire, etc.<sup>14</sup>

Under Section 16 of the Act, the Commission is authorized to make an award of damages whenever, after a hearing and upon complaint made, it shall find that the party complaining is entitled to an award of damages under the provisions of the Act "for a violation thereof." With respect, therefore, to the performance by carriers for the shipping public of their general duties as common carriers other than those governed by the act, the Commission is without authority.<sup>15</sup> Thus, the Commission's jurisdiction over claims for damages does not extend to claims arising from loss, damage or delay to shipments in transit, such claims being cognizable only in the courts.<sup>16</sup> The Commission has no authority to enforce a contract between two carriers.<sup>17</sup>

**§ 282. Conflicting Provisions Harmonized and Exclusiveness of Remedy before Commission, in Certain Cases, Established.** Although section 9 of the Interstate Commerce Act provides two methods of procedure for the recovery of damages resulting from a violation of the statute, one before the courts, and the other before the Commission, section 22 prescribes that nothing in the Act shall in any way abridge or alter the remedies existing at common law or by statute. These and other sections of the Act have been so construed in a series of cases by the national Supreme Court that the remedies provided by section nine for damages, under certain

Salle & Bureau C. R. Co. v. Chicago & N. W. Ry. Co., 13 I. C. C. 610; Macbride Coal & Coke Co. v. Chicago, St. P., M. & O. Ry. Co., 13 I. C. C. 571; Haines v. Chicago, R. I. & P. Ry. Co., 13 I. C. C. 214; Shiel & Co. v. Illinois Cent. R. Co., 12 I. C. C. 10; Railroad Commission of Florida v. Savannah, F. & N. Ry. Co., 5 I. C. C. 13.

14. Carstens Packing Co. v.

Pennsylvania Co., 19 I. C. C. 475; Duncan v. Atchison, T. & S. F. Ry. Co., 6 I. C. C. 85.

15. Blume & Co. v. Wells, Fargo & Co., 15 I. C. C. 53.

16. Atlas Portland Cement Co. v. Lehigh Valley R. Co., 32 I. C. C. 487.

17. Laona & N. R. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 24 I. C. C. 639.



conditions hereinafter discussed, are not concurrent. On the contrary, actions for damages in certain cases may not be instituted in the courts without a prior proceeding and finding by the Interstate Commerce Commission.<sup>18</sup> The adjudication giving the Interstate Commerce Commission exclusive preliminary jurisdiction in certain actions for damages was first established by the Supreme Court in 1907 and has been adhered to since that time. The principles determining when the jurisdiction of the Commission is exclusive are discussed in the succeeding paragraphs.

**§ 283. Courts Without Primary Jurisdiction to Award Damages for Exaction of Excessive Interstate Rates.** To prevent unjust discriminations and preferences between shippers, the Interstate Commerce Act requires all interstate carriers to file schedules of their rates, fares and charges for the transportation of passengers and property with the Interstate Commerce Commission, and no carrier may collect or receive a greater or less or different compensation for such transportation

18. *Pennsylvania R. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120, 61 L. Ed. 188, 37 Sup. Ct. 46; *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 60 L. Ed. 517, 36 Sup. Ct. 228; *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 59 L. Ed. 1414, 35 Sup. Ct. 888; *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Texas & P. R. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 58 L. Ed. 1255, 34 Sup. Ct. 885; *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; *Morrisdale Coal Co. v. Pennsyl-*

*vania R. Co.*, 230 U. S. 304, 57 L. Ed. 494, 33 Sup. Ct. 938; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315; *United States v. Pacific & A. Ry. & Nav. Co.*, 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. 316; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 519, 32 Sup. Ct. 205; *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Interstate Com-*



than is specified in the tariffs so filed.<sup>19</sup> When such rates have been duly filed and published as required by law, they cannot be changed by a carrier without the filing and publication of a new rate and charge. Such published rates, fares and charges are presumed to be reasonable until set aside by the Interstate Commerce Commission upon a complaint and hearing.

The power given under section eight of the Act to the Commission to award damages for exaction of unreasonable rates is complementary to the power to determine the reasonableness of the scheduled rates. The jurisdiction of the Commission over these two subject matters is exclusive.<sup>20</sup> A shipper cannot, therefore, prosecute an action in either the state or the federal courts for damages on account of the unreasonableness or the excessiveness of a scheduled rate or charge without a previous finding and order by the Interstate Commerce Commission.<sup>21</sup> If the courts were permitted to award damages for excessive rates and charges without a preliminary order of the Commission, the question as to what would constitute a reasonable rate would vary according to the different judgments of different juries in the various courts. The uniformity of rates for similar services would thus be destroyed; for in ascertaining the damage due to a shipper from the collection of an overcharge, the court would be compelled to determine what would constitute a reasonable rate as the measure of damages is the difference between the rate charged and the rate found to be reasonable.

merce Commission v. Chicago & A. R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163.

19. Section 250, *supra*.

20. Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938; United States v. Pacific & A. Ry. & Nav. Co., 228 U. S. 87, 57 L. Ed. 742, 33 Sup. Ct. 443; Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075.

21. Western & A. R. Co. v. White Provision Co., 142 Ga. 246, 82 S. E. 644; Robinson v. Baltimore & O. R. Co., 64 W. Va. 406, 63 S. E. 323.

State courts have no authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission. Cleveland & W. Coal Co. v. Pennsylvania Coal Co., ——— Ohio ———, 119 N. E. 367.

The right of an individual to maintain an action in the courts to obtain damages for the violation of the Interstate Commerce Act as conferred by Section 9 must be confined to the redress of such wrongs as can be remedied by the courts without previous action by the Commission and it has not therefore implied the power in the courts to primarily entertain complaints for the award of damages to individuals because of the unreasonableness of rates and charges.<sup>22</sup> Thus, in the case last cited, a shipper brought a suit in a state court against a carrier for damages on the ground that the rate charged for the shipment of cotton seed from a point in Louisiana to a point in Texas was unjust and unreasonable. The state court awarded judgment because the rate was excessive notwithstanding the fact that the charges collected were in conformity with the rate schedules on file with the Interstate Commerce Commission. The court held that a shipper had a common law right to sue and recover freight charges in excess of a reasonable compensation. But on writ of error to the United States Supreme Court, the case was reversed in an opinion holding that a shipper seeking damages predicated upon the unreasonableness of a scheduled interstate rate, must, under the Act to Regulate Commerce, primarily invoke redress through the Interstate Commerce Commission.

**§ 284. But Actions for Overcharges Exceeding Scheduled Rates may be Prosecuted in Courts without Previous Determination of Commission.** When a carrier charges more than, or otherwise departs from, the published rate on file with the Interstate Commerce Commission, the courts may determine whether the published rate or more than the published rate has been collected in a given case without a previous determination by the Commission.<sup>23</sup> If a carrier departs from

22. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075.

23. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315; *Gimbel*

a published tariff, the injured party may sue without previous action by the Commission, because the courts can apply the law prohibiting a departure from the tariff to the facts of a particular case.<sup>24</sup> An action, therefore, may be prosecuted in the courts to recover amounts paid for interstate transportation in excess of the scheduled rates and charges on file with the Commission.<sup>25</sup>

The line of distinction showing when a shipper may sue in the courts for overcharges without previous action by the Commission, and when he cannot, was thus well stated by the Circuit Court of Appeals:<sup>26</sup> "Under what circumstances, if at all, the option apparently offered by section 9 may be available, we will endeavor to determine from a consideration of the nature of the Interstate Commerce Act. Varying secret rates, unjust discriminations, undue preferences, were the evils to be cured. Publicity, uniformity, and equality, with respect to all matters of rates and practices, were the remedies. And a new means was created for administering the remedies, namely, the commission with its supervisory and regulatory powers. The commission was added as an instrumentality of the administrative (executive) department of government, and two distinct classes of powers were conferred upon it, *quasi* legislative and *quasi* judicial. When shippers before the commission challenge a published rate as unjust and demand the fixing of a just rate, and fail to make a claim or admit they have no claim for damages accrued, they present nothing but matter that is legislative in its nature. Congress directly and in the first instance might have inquired into the character and value of the particular transportation service now under investigation by the commission and have named the rate therefor in a statute. But, with the increasing complexities of

Bros., Inc. v. Barrett, 215 Fed. 1004; National Pole Co. v. Chicago & N. W. R. Co., 127 C. C. A. 561, 211 Fed. 65.

24. Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

25. Geraty v. Atlantic Coast Line R. Co., 211 Fed. 227.

26. National Pole Co. v. Chicago & N. W. R. Co., 127 C. C. A. 561, 211 Fed. 65.



human activities, it was impossible to cover the details of ratemaking (and the same is true of many other subjects) by specific statutes; and so the board or commission form of legislation was used. That is, Congress declared the public policy and fixed the legal principles that were to control, and charged an administrative body with the duty of ascertaining within particular fields from time to time the facts on which the legal principles established by Congress would be brought into play. Such action by the commission, to be constitutional, cannot of course be legislation, for the whole of the lawmaking power of the United States, except the advisory and veto power of the President, is in Congress. But since the Congressional prohibition of unjust rates cannot, by the terms of the act, be effective against a particular published rate, although unjust, until the commission has investigated the service in question and has established the standard of justness for all shippers who use that service, the action of the commission in regulation of rates is *quasi* legislative—it converts the actual legislation from a static into a dynamic condition. When shippers before the commission challenge a published rate as unjust and demand the fixing of a just rate, and additionally ask a reparation order for damages measured by the excess of the published rate over the declared just rate as applied to their shipments, their additional or secondary demand, considered by itself, presents nothing but matter that is judicial in its nature. There is a controversy, between parties, in which none but the parties are interested, to be settled by hearing the evidence, finding the facts and applying the law, and the settlement to be binding only upon parties and privies. In such a controversy the facts to be found from the evidence are the facts that pertain to the particular shipments and payments of the complaining shipper, and the law to be applied is the Interstate Commerce Act by virtue of either its direct terms or an administrative, *quasi* legislative declaration of the commission. The commission's action in such a controversy, to be constitutional, cannot of course be judicial, for the whole of the judicial power of the United



States is vested in its courts. But, while such action is of a judicial nature, in respect to power it is only *quasi* judicial, since a judicial determination of a controversy is a final determination embodied in a judgment or decree of a court and enforceable by execution or other writ of the court. Turning now to section 8, that the 'carrier shall be liable to the person injured for the full amount of damages sustained in consequence of any violation of the provisions of this act,' let us see what is required to constitute a cause of action thereunder. If a shipper states in his complaint that he paid 12 cents per hundredweight on certain described shipments, that during the times of the shipments the carrier had a published tariff of 10 cents per hundredweight on such shipments, and that the payments exacted of the shipper were unjust to the extent of 2 cents per hundredweight, the stated facts make a good complaint, for the statutory prohibition of unjust rates is directly effective by reason of the published rate's being equivalent to a statutory declaration of the maximum of reasonable rates. There need be no administrative, *quasi* legislative determination of conditions on which the statutory prohibition would be brought into effect. Such a complaint for damages is presentable to the commission for its *quasi* judicial action. Or, under section 9 the plaintiff may at once demand judgment in a federal District Court. *Pennsylvania R. Co. v. International Coal Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446. If a shipper states in his complaint that he paid 12 cents per hundredweight on certain shipments, that the carrier's published rate on such shipments was 12 cents per hundredweight, and that the payments exacted of the shipper were unjust to the extent of 2 cents per hundredweight, the stated facts fail to constitute a cause of action, for the statutory prohibition of unjust rates cannot, in the face of the presumption attaching to the carrier's published rate, be effective until the commission has exercised its *quasi* legislative function of determining the just rate, with which the trier of the damage case may compare the facts respecting the plaintiff's shipments and the payments therefor exacted by the carrier. But

when the rate-determining function has been fully exercised by the commission (and the function is exactly the same whether exercised over a present or future rate, or over a past or abandoned rate (*Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472), then the statutory standard is as definite and specific as if Congress itself had fixed the rate. And consequently it seems clear to us that, since legislation is for all citizens and subjects and therefore requires uniformity and equality, while judgments concern only the parties litigant and therefore may be variant or contradictory without affecting their nature, whenever damages are occasioned by unjust exactions and the standard of justness is definitely fixed in the act itself or in the *quasi* legislative determination of the commission, an injured party who has had no hand in procuring either the legislation or the *quasi* legislation is given a cause of action by section 8, and for his damages he may have by virtue of section 9 either a reparation order of the commission or a judgment of a federal District Court. This must be the result because, on the basis that all legislative functions have been completely and explicitly exercised, there would be nothing for the commission to do for an injured shipper except to apply to his particular facts the universal law, and that can be done as well in court without disturbing or obstructing the Act's cardinal purposes of uniformity and equality in the legislative subject matter of rates and practices."

**§ 285. Suits for Damages Recoverable Under Section 8 cannot be Prosecuted in State Courts.** When an act creates a new liability or gives a right of action and at the same time prescribes the means by which, or the court in which, the right is to be enforced, resort may not be had to any other means or court, than that prescribed.<sup>27</sup> As it is specifically provided in Section 9 that a person claiming to be damaged by any common

27. *Carlisle v. Missouri Pac. Ry.* *Siggins v. Chicago & N. W. R. Co.*, 168 Mo. 652, 68 S. W. 898; 153 Wis. 122, 140 N. W. 1128.

carrier for a violation of the Act may, at his election, make complaint to the Commission or bring suit in a federal court of competent jurisdiction, it follows that the state courts have no jurisdiction to enforce claims for damages due to a violation of the Interstate Commerce Act.<sup>28</sup> A shipper cannot maintain an action at common law in a state court to recover the excess of unjust and unreasonable freight charges exacted on interstate shipments when the rates charged were those fixed by the schedules.<sup>29</sup>

Where a particular remedy is provided by law, such remedy must be sought to the exclusion of all others in the cases contemplated by statute; otherwise, a person claiming injury under the Interstate Commerce Act, instead of being compelled to elect which one of the two methods of procedure provided by the Act he will adopt, will be afforded a third alternative not contemplated or provided for in the statute. This would be a violation of the express terms of the statute whereby he is limited to a choice between two remedies.<sup>30</sup> The Interstate Commerce Commission and the federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments whether they grow out of an

28. **United States.** *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Union Pac. R. Co. v. Oregon-Washington Lumber Manufacturers' Ass'n*, 91 C. C. A. 51, 165 Fed. 13; *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Ass'n*, 91 C. C. A. 39, 165 Fed. 1; *Sheldon v. Wabash R. Co.*, 105 Fed. 785; *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. 981.

**California.** *Olcovich v. Grand Trunk R. Co. of Canada*. 20 Cal. App. 349, 129 Pac. 290.

**Georgia.** *Western & A. R. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644.

**Louisiana.** *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 12 L.

R. A. 725, 26 Ann. St. Rep. 198, 9 So. 441.

**Nebraska.** *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

**Pennsylvania.** *Puritan Coal Min. Co. v. Pennsylvania R. Co.*, 237 Pa. 420, Ann. Cas. 1914B 37, 85 Atl. 426.

**Texas.** *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 4 Ann. Cas. 770, 83 S. W. 362.

**West Virginia.** *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323.

29. *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323.

30. *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 4 Ann. Cas. 770, 83 S. W. 362.



excessive rate or out of misrouting.<sup>31</sup> A state court has no jurisdiction of an action to recover damages from a railroad company for charging the shipper rates in excess of those prescribed by the Interstate Commerce Act.<sup>32</sup>

**§ 286. Damages Caused by Unjust Discrimination, Preliminary Order of Commission Essential, When.** Whenever in any claim for damages against an interstate carrier for violating the Interstate Commerce Act, the determination thereof involves matters calling for the exercise of the administrative power and discretion of the Commission, a preliminary order by the Commission is essential before the shipper may proceed in the courts.<sup>33</sup> Thus, when a shipper is seeking damages because of a discriminatory rule of a railroad company in distributing cars for interstate shipments during times of car shortage, the question whether the rule or method of car distribution practiced by the railroad company is unjustly discriminatory, is one which the Commission is authorized to pass upon, and no action can be maintained in the courts to recover damages alleged to have been inflicted thereby until the Commission has made its finding as to the reasonableness of the rule.<sup>34</sup> But if an action is based upon a discriminatory enforcement of the carrier's own rule for car distribution, no administrative question is involved. Such an action, although brought against an interstate carrier

31. *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, 140 N. W. 1128.

32. *Carlisle v. Missouri Pac. Ry. Co.*, 68 Mo. 652, 68 S. W. 898.

33. *Loomis v. Lehigh Valley R. Co.*, 240 U. S. 43, 60 L. Ed. 517, 36 Sup. Ct. 228; *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Texas & P. R. Co. v. American Tie & Lumber Co.*, 234 U. S. 138, 58 L.

Ed. 1255, 34 Sup. Ct. 885.

34. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. E. 1472, 33 Sup. Ct. 916; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164.



for damages arising in interstate commerce, may be brought in the courts with a preliminary finding by the Commission.<sup>35</sup>

**§ 287. Original Jurisdiction of State Courts to Award Damages Against Interstate Carriers not Wholly Superseded.** The authority granted to the Interstate Commerce Commission and the federal courts to award damages against interstate carriers for violations of the Act to Regulate Commerce does not supersede the original jurisdiction of state courts without previous action of the Commission, in any case where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relates to a subject as to which the jurisdiction of the federal courts has not otherwise been made exclusive.<sup>36</sup> For example, a shipper may prosecute an action for damages against a carrier for a failure to comply with its common law duty of furnishing cars for the shipment of coal even though the cars were to be used in conveying coal in interstate commerce.<sup>37</sup>

35. *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. St. 760; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484.

36. *Illinois Cent. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760.

37. *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484, wherein it was said: "But secs. 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of all suits for damages occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently, for

the purpose of preventing such a result, the proviso to sec. 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' That proviso was added at the end of the statute,—not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in ship-

§ 288. **In Actions for Damages for Violation of Statute Pecuniary Loss Must be Shown.** The only right of recovery given by the Interstate Commerce Act to an individual against a common carrier is to the "person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act." It therefore follows that before any party can recover under the statute, he must show not merely the wrong of the carrier, but that the wrong shown did, in fact, operate to his injury.<sup>38</sup> The statute gives a right of action for *damages* to the *injured* party. By the use of these legal terms, it is clearly indicated that the damages recoverable were those known to the law and intended as compensation for an injury sustained, that is, of pecuniary loss inflicted.<sup>39</sup>

ment; damages caused by failure to comply with its common law duties and the like. But for this proviso to sec. 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. *Galveston etc., R. R. v. Wallace*, 223 U. S. 481. Construing, therefore, secs. 8, 9 and 22 in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing cause of action. It did not supersede the jurisdiction of state courts in any cause, new or old, where the decision did not involve the determination of matters calling for

the exercise of the administrative power and discretion of the Commission; or relate to a subject as to which the jurisdiction of the federal courts had otherwise been exclusive."

38. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, Ann. Cas. 1916 B 691; *Parsons v. Chicago & N. W. Ry. Co.*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. 887; *Darnell-Taenzer Lumber Co. v. Southern Pac. Co.*, 137 C. C. A. 460, 221 Fed. 890; *Lehigh Valley R. Co. v. American Hay Co.*, 135 C. C. A. 307, 219 Fed. 539; *Lehigh Valley R. Co. v. Clark*, 125 C. C. A. 235, 207 Fed. 717; *Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co.*, 79 C. C. A. 46, 148 Fed. 968; *Public Service Commission of Missouri v. Wabash R. Co.*, 37 I. C. C. 297; *Eagle Ice Co. v. Chicago, M. & St. P. Ry. Co.*, 37 I. C. C. 250; *Union Tanning Co. v. Southern Ry. Co.*, 25 I. C. C. 112.

39. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed.

Neither the Commission nor the courts are justified in awarding damages for a violation of the Act except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another.<sup>40</sup> A complainant must establish the fact of his damage as well as the amount of the damages he claims.<sup>41</sup> For example, if a complainant paid charges which were found by the Commission to be discriminatory, this of itself, is not sufficient to award a finding of damages.<sup>42</sup>

**§ 289. Measure of Damages for Unreasonable Rates and Unlawful Discriminations.** The first section of the Interstate Commerce Act declares that all rates shall be just and reasonable. If a carrier prescribes by its schedules and collects a rate which is unjust and unreasonable, it thereby violates the first section. Any person who has paid such an excessive rate, may, by complaint to the Commission, upon showing that the rate was unjust and unreasonable, and to what extent, obtain an order for the payment of damages in the event that the sum paid exceeded a just and reasonable rate.<sup>43</sup>

644, 35 Sup. Ct. 328, Ann. Cas. 1916B 691; *Chattanooga I. & Mfg. Co. v. Louisville & N. R. Co.*, 40 I. C. C. 150; *Shelbyville Business Men's Ass'n v. Louisville & N. R. Co.*, 37 I. C. C. 675; *National Pickle & Canning Co. v. Chicago, M. & St. P. R. Co.*, 37 I. C. C. 403; *Axton v. Kanakha & M. Ry. Co.*, 37 I. C. C. 389; *Manufacturers & Merchants' Ass'n of New Albany v. Aberdeen & A. R. Co.*, 37 I. C. C. 350; *Coffeyville Mercantile Co. v. Missouri, K. & T. R. Co.*, 33 I. C. C. 122; *Greenbaum v. Louisville & N. R. Co.*, 31 I. C. C. 699; *Hormel & Co. v. Chicago, M. & St. P. R. Co.*, 30 I. C. C. 98; *New Orleans Board of Trade v. Illinois Cent. R. Co.*, 29 I. C. C. 32; *Anadarko Cot-*

*ton Oil Co. v. Atchison, T. & S. F. R. Co.*, 20 I. C. C. 43.

40. *Anadarko Cotton Oil Co. v. Atchison, T. & S. F. R. Co.*, 20 I. C. C. 43.

41. *New Orleans Board of Trade v. Illinois Cent. R. Co.*, 29 I. C. C. 32.

42. *Greenbaum v. Louisville & N. R. Co.*, 31 I. C. C. 699.

43. *American Grass Twine Co. v. Chicago, St. P., M. & O. Ry. Co.*, 12 I. C. C. 141; *McGrew v. Missouri P. R. Co.*, 8 I. C. C. 630; *Cattle Raisers' Ass'n v. Fort Worth & D. C. Ry. Co.*, 7 I. C. C. 513; *Michigan Box Co. v. Flint & P. M. R. Co.*, 6 I. C. C. 335; *Perry v. Florida, C. & P. R. Co.*, 5 I. C. C. 97; *Lehmann, Higginson & Co. v.*



The measure of damages, therefore, in reparation cases based upon an unreasonable rate, is the difference between the excessive rate actually collected and the lower rate which the Commission decides to have been a reasonable rate.<sup>44</sup>

The early theories of the Commission with regard to reparation on account of undue preferences and unjust discriminations were substantially modified after the decision of the Supreme Court in *Pennsylvania R. Co. v. International Coal Co.*,<sup>45</sup> wherein the court held that in a discrimination case the damage to the complainant, if any, may be exactly equal to the difference between the rates paid by the complainant and those paid by his competitors, that it may be more or it may be substantially less, but whatever it is, the complainant must prove his damage with the same degree of certainty that would justify a judgment in court. In actions, therefore, for damages due to unlawful discriminations and preferences, accomplished by means of rebating, the old theory that the amount of the rebate furnished the measure of damages, has been abandoned. The plaintiff must now prove that he was actually damaged by reason of such undue discrimination or preference, and must furthermore prove the amount of such damages.<sup>46</sup>

Where the payment of rebates to a competitor does the complainant no harm, he cannot recover damages on such payments in a suit for unjust discrimination.<sup>47</sup> "But it is said that the reports disclose that the Com-

*Texas & P. R. Co.*, 5 I. C. C. 44; *Railroad Commission of Florida v. Savannah, F. & W. Ry. Co.*, 5 I. C. C. 13.

44. *Sanford-Day Iron Works v. Louisville & N. R. Co.*, 41 I. C. C. 12; *Oden & Elliott v. Seaboard Air Line R. Co.*, 37 I. C. C. 345; *National Wool Growers Ass'n v. Oregon Short Line R. Co.*, 35 I. C. C. 675; *Kindleton v. Southern P. Co.*, 17 I. C. C. 251; *Nicola, Stone*

& *Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199.

45. *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, Ann. Cas. 1915A 315.

46. *Wilkes & Co. v. Alabama G. S. R. Co.*, 39 I. C. C. 447; *Spiegle v. Southern Ry. Co.*, 32 I. C. C. 687; *Hormel & Co. v. Chicago, M. & St. P. Ry. Co.*, 30 I. C. C. 98.

47. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 181 Fed. 403.



mission," said Mr. Justice Van Devanter,<sup>48</sup> "applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company, and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by section 8 of the Act to Regulate Commerce to award 'the full amount of damages sustained,' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis. The case of *Pennsylvania Railroad v. International Coal Mining Co.*, 230 U. S. 184, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to section 8, said (p. 203): 'The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recover-

48. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, Ann. Cas. 1916B 691.

ed. Whatever they were they could be recovered.' There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

**§ 290. Parties Entitled to Damages for Excessive Freight Charges—Consignors and Consignees.** A party entitled to recover damages for freight charges found by the Commission to be excessive is the one who has either, by himself or by another, paid and borne the freight charges for the transportation service, irrespective of the title of the property shipped.<sup>49</sup> Where freight charges are paid by the consignees but are charged back to the consignors, the consignees are not entitled to reparation.<sup>50</sup>

If shipments are made and sold f. o. b. destination under a contract which provides that if the traffic rate shall decline or advance, the buyer is to have the benefit of the one and to assume the burden of the other, the consignors are the parties entitled to a reparation.<sup>51</sup> But sometimes neither the consignor nor the consignee is entitled to reparation. Strangers to the transportation transaction may recover if they have borne the freight charges, for an undisclosed principal of a nominal shipper may maintain an action against the carrier.<sup>52</sup>

49. *Hygienic Ice Co. v. Chicago & N. W. Ry. Co.*, 37 I. C. C. 384; *Oden & Elliott v. Seaboard Air Line Ry. Co.*, 37 I. C. C. 345.

50. *Traffic Bureau of the Sioux City Commercial Club v. Anderson & S. R. R. Co.*, 37 I. C. C. 353; *Commercial Club of Omaha v. Anderson & S. R. R. Co.*, 27 I. C. C. 302; *Mountain Ice Co. v. Delaware, L. & W. R. Co.*, 21 I. C. C. 45.

51. *Sloss-Sheffield Steel & Iron Co. v. Louisville & N. R. Co.*, 40 I. C. C. 738; *Baker Mfg. Co. v. Chicago & N. W. Ry. Co.*, 21 I. C. C. 605.

52. *Ford v. Williams*, 21 How. (U. S.) 287, 16 L. Ed. 36; *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. (U. S.) 344, 12 L. Ed. 465; *Oden & Elliott v. Seaboard Air Line Ry. Co.*, 37 I.

**§ 291. Right of Shipper to Reparation When Arbitrary Sum is Added to Sale Price to Cover Excessive Charges.** The measure of damages for the exaction of an excessive rate by carriers as to interstate shipments is the difference between the rate to which the shipper is entitled and the rate he was compelled to pay.<sup>53</sup> Counsel for carriers as defendants in reparation cases have frequently urged that if a shipper has paid a rate that is later found to have been unreasonable, but has conditioned his commercial transactions in the light of and on the basis of the rate paid, he has passed along to his vendees any damage he might have sustained and is, therefore, not entitled to reparation; but this theory has been rejected by the Commission and the courts.

Reparation for the exaction of unreasonable rates cannot be denied because the shipper or the consignee, from whom the same has been collected, has, on that account, secured a high price for the commodity from the purchaser; for, if shippers were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of a freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.<sup>54</sup> In an action to recover damages, based upon an order of the Interstate Commerce Commission made pursuant to its powers under sections 8 and 16 of the Act, and award-

C. C. 345; *Lindsay Bros. v. Grand Rapids & I. Ry. Co.*, 15 I. C. C. 182.

53. *Michigan Hardwood Manufacturers Ass'n v. Transcontinental Freight Bureau*, 27 I. C. C. 32; *National Wool Growers Ass'n v. Oregon Short Line R. Co.*, 25 I. C. C. 675; *Nicola, Stone & Myers Co. v. Louisville & N. R. Co.*, 14 I. C. C. 199; *Gardner & Clark v. Southern Ry. Co.* 10 I. C. C. 342.

"With respect to reparation because of the payment of a rate that is unreasonable *per se*, the Commission has followed the rule that the measure of damages is the difference between the rate

paid and that which would have been paid under the unreasonable rate, and has declined to go beyond the parties to the transportation contract in an effort to prove or to disprove that the complainant was damaged." Annual Report of the Interstate Commerce Commission for the year 1916, p. 75.

54. *Ballou & Wright v. New York, N. H. & H. R. Co.*, 34 I. C. C. 120; *Michigan Hardwood Manufacturers Ass'n v. Transcontinental Freight Bureau*, 27 I. C. C. 32; *Burgess v. Transcontinental Freight Bureau*, 13 I. C. C. 668.



ing reparation for excessive rates paid to a shipper for the transportation of motoreycles from a point in Massachusetts to cities in Oregon and Washington, the carriers set up in their answer, as a defense, that the consignee, who was the complainant, sold each motorecycle to the trade at a retail price of \$15 in excess of the factory list price, and that this sum was added to cover, and did cover, the difference in freight charges sought to be recovered as damages by the complainant. To this defense the trial court sustained a demurrer and refused to permit testimony in support thereof. In affirming the action of the district court, the circuit court of appeals held that a shipper cannot be deprived of the reparation provided by law, because in his business, the freight charges paid entered as an element of cost and were passed along to the ultimate purchaser in the selling price.<sup>55</sup>

§ 292. **Foregoing Principle Approved by Federal Supreme Court—Southern P. Co. v. Darnell-Taenzer Lumber Co.** After the cases cited in the foregoing paragraph were decided, the federal Supreme Court also approved the principle that a shipper is entitled to recover from the carrier damages for the exaction of unreasonable rates or charges although he collects the amount from the purchasers of the goods because a carrier ought not to be allowed to retain its illegal profit; and if a shipper were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify them.<sup>56</sup> “The only question before us,” said Mr. Justice Holmes, “is that at which we have hinted: Whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that

55. New York, N. H. & H. R. Co. v. Ballou & Wright, — C. C. A. —, 242 Fed. 862.

56. Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 62 L. Ed. —, 38 Sup. Ct. —, decided Jan. 21, 1918.



amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. *Olds vs. Mapes-Reeve Construction Co.*, 177 Mass., 41, 44. Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios*, with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. *State vs. Central Vermont Ry. Co.*, 81 Vt. 459. See *Nicola, Stone & Myers Co. vs. Louisville & Nashville R. R. Co.*, 14 I. C. C. 207-209. *Baker Manufacturing Co. vs. Chicago Northwestern Ry. Co.*, 21 I. C. C. 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. *New York, New Haven & Hartford R. R. Co. vs. Ballou & Wright*, 242 Fed. Rep., 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result. 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts."

**§ 293. Reparation on Past Shipments not Automatically Awarded on Finding that Rate is Excessive.** When the Interstate Commerce Commission finds, upon a complaint and hearing, that a rate is unreasonable and, therefore, in violation of the act, it does not thereby

follow that the Commission will award reparation covering the statutory period of two years prior to the date the complaint was filed upon the basis of the new rate established and found to be reasonable;<sup>57</sup> for a rate may be reasonable at one period of its existence, and at a later period unreasonable because of changed conditions and circumstances.<sup>58</sup> There is no conclusive presumption that a rate reasonable at one time was reasonable a month or a year before, since reasonable rates vary from time to time. Where, therefore, rates have been established and maintained by a carrier in good faith, especially where they have been long in effect and acquiesced in by shippers without protest, the Commission will not award reparation, even though the rate is reduced, unless it clearly appears that the rates paid in the past have been excessive.<sup>59</sup>

In every case where reparation is demanded, the Commission must fix the point of time when the rate became unreasonable, must determine when shippers were entitled to, and when carriers ought to have established the rate found reasonable. Each case must depend upon its own facts.<sup>60</sup> The general principles determining when reparation will be awarded were thus stated by the Commission:<sup>61</sup> "An award of the Commission in reparation of damages resulting from a violation of the

57. Coffeyville Mercantile Co. v. Missouri, K. & T. Ry. Co., 33 I. C. C. 122; Memphis Freight Bureau v. Illinois Cent. R. Co., 27 I. C. C. 507; Waukesha Lime & Stone Co. v. Chicago, M. & St. P. Ry. Co., 26 I. C. C. 515; Minneapolis Steel & Machinery Co. v. Chicago, M. & St. P. Ry. Co., 26 I. C. C. 193; New Pittsburgh Coal Co. v. Hocking Valley Ry. Co., 26 I. C. C. 121; Lewis v. Chicago, B. & Q. R. Co., 25 I. C. C. 97; Kellogg Toasted Corn Flake Co. v. Michigan Cent. R. Co., 24 I. C. C. 604; Railroad Commission of Oregon v. Southern P. Co., 24 I. C. C. 273; Holland Blow Stave Co. v. Atlantic Coast

Line R. Co., 24 I. C. C. 81; Memphis Freight Bureau v. St. Louis & S. F. Ry. Co., 21 I. C. C. 113; Sweeney, Lynes & Co. v. New York, P. & N. R. Co., 20 I. C. C. 600; Riverside Mills v. Charleston & W. C. Ry. Co., 20 I. C. C. 423.

58. Carter White Lead Co. v. Norfolk & W. Ry. Co., 21 I. C. C. 41.

59. Penrod Walnut & Veneer Co. v. Chicago, B. & Q. R. Co., 15 I. C. C. 326.

60. *In re Wool, Hide & Pelt Rates*, 25 I. C. C. 675.

61. Anadarko Cotton Oil Co. v. Atchison, T. & S. F. Ry. Co. 20 I. C. C. 43.

Act to Regulate Commerce is not enforceable as such, but in a suit in court for such damages the findings and order of the Commission are *prima facie* evidence in support thereof. It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another. The standard of the law by which the validity of any rate as affected by its amount is determined, is not more definite than that it must be reasonable and just. The test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rate in effect at any particular time. In the nature of the case there can be no rule or process whereby the definite absolute maximum limit of reasonableness in the amount of a rate can be fixed with the certainty of a demonstration. The law imposes upon carriers the duty of initiating their rates, under the injunction of the statute that they shall be reasonable and just. In the performance of this duty by the carriers they must exercise judgment and discretion by a like resort to existing facts, circumstances, and conditions in the first instance, just as the Commission must later do when the rates are brought in question before it. The carriers are presumed to act in good faith in their exercise of discretion and judgment under this somewhat indefinite standard of the statute in its practical application, and therefore rates established by the carriers can not be condemned except upon investigation and full hearing. A rate reasonable in view of the circumstances and conditions when it is established may in course of time become unreasonable by virtue of changed circumstances and conditions. It is manifestly impracticable for the carriers or the Commission in such a case to determine at what exact time in the gradual process of changes the rate becomes unreasonable. In the matter before us it appears that some of the rates between many of the points involved were formerly higher than at present, and the situation here fairly



illustrates what has taken place elsewhere in reductions from time to time in rates as the density of traffic increases with that of population and business development in a new and growing community. It would be a manifestly harsh rule that would assume a rate now condemned as unreasonable to have been so for a period of two years, or that of the statute of limitations, in the past as a basis for the payment of money by the carriers on past shipments, especially when no complaint had been made against them within that period. Certain it is that the law establishes no such presumption, nor is it a necessary sequence that the rate has been unreasonable for any period in the past. Neither does it seem that the *bona fide* action of the carriers in the necessary exercise of their judgment within reasonable limits should always be at their peril of liability for reparation for the difference between rates initiated upon their judgment and later changed upon the judgment of the Commission. Therefore the awarding of reparation by no means necessarily follows the reduction of a rate, whether by the voluntary action of the carriers or by order of the Commission. When a rate is advanced and the increased rate is condemned by the amount of the advance, a much more satisfactory basis for an award of reparation is afforded than in a case like the one before us, where so far as changes have occurred they have been, at least for the most part, reductions in a territory where changes in conditions have taken place which contribute in greater or less degree to a present showing of unreasonableness in existing rates. Again our records show in many instances that rates have long remained in the tariffs, sometimes without frequent occasion on the part of shippers to use them, and when traffic has been offered to which they were applied they have not only been challenged by the shipper as unreasonable, but conceded to be so by the carriers and clearly so found by the Commission by comparison with other rates and by other suitable tests, and orders for reparation have followed. The reference to particular circumstances and conditions in the classes of cases just mentioned is not an intimation that awards



of reparation are to be confined to such cases. It is intended only to make clearer our view that whatever may be the nature of the facts, circumstances and conditions appearing in a particular case where reparation is involved, whether on account of excessive rates or by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well-established principles of law as a basis for a judgment in court."

**§ 294. Damages Growing out of Inadequate Service or Facilities.** The Commission has held that it has jurisdiction to award damages or reparation growing out of an unjust discrimination and preference in train service equipment furnished for the transportation of milk in carloads from one state to another.<sup>62</sup>

**§ 295. Damages for Misrouting Shipments May be Awarded by Commission, When.** The Act to Regulate Commerce confers upon the Commission jurisdiction over a complaint for the recovery of a damage resulting from misrouting a shipment, where such damage arises from a rate or charge in excess of the lawful rate or charge that would have applied *via* the route over which the shipment properly should have moved or a movement which was specifically directed by the shipper.<sup>63</sup>

**§ 296. Reparation Awarded by Commission for Overcharges a Bar to Subsequent Action for Additional Damages.** The statute contemplates that when a shipper makes his complaint to the Commission for reparation because of excessive rates or charges, the Commission may award to him the full amount of damages sustained. A shipper may not, therefore, after com-

62. *Graustein v. Boston & M. R. Co.*, 45 I. C. C. 393.

63. *Noble v. Jonesboro, I. C. & E. R. Co.*, 20 I. C. C. 520; *Cressey*

& *Co. v. Chicago, M. & St. P. Ry. Co.*, 18 I. C. C. 132; *Kile & Morgan Co. v. Deepwater Ry. Co.*, 15 I. C. C. 235.

plaining to the Interstate Commerce Commission and obtaining a sum as reparation for unreasonable rates, institute and prosecute an action for damages to his business because the carrier wilfully and maliciously maintained unreasonable rates.<sup>64</sup> "The Court of Appeals," said Mr. Justice Holmes in the case cited, "decided that the Act to Regulate Commerce committed to the Interstate Commerce Commission only the granting of special relief against the making of an overcharge and that the satisfaction of the Commission's award still left open an action in the state courts to recover what are termed general damages—such as are supposed to have been recovered in this case. In this we are of opinion that the court was wrong. By section 8 a common carrier violating the commands of the act is made liable to the person injured thereby 'for the full amount of damages sustained in consequence' of the violation. By section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other. An award directing the carrier to pay to the complainant the sum to which he is entitled is provided for by section 16. By the same section if the carrier does not comply in due time with the order, the complainant may sue in a state court—which implies that if the order has been complied with, and the money paid, no suit can be maintained. It is to be noticed further that reparation before answer is contemplated as possible by section 13, and, in that case, the carrier shall be relieved of liability to the complainant though only of course for the particular violation of law. The decisions say that whatever the damages were they could be recovered; *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184,

64. *Louisville & N. R. Co. v. Ohio Valley Tie Co.*, 242 U. S. 288, 61 L. Ed. 305, 37 Sup. Ct. 120.

202, 203; *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 429; and that the statute determines the extent of damages. *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 472. We are of opinion that all damage that properly can be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remote result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid."

**§ 297. Findings of Commission on Reasonableness of Rates Inure to Benefit of Every Person Paying the Unjust Rate.** A proceeding before the Interstate Commerce Commission to determine the reasonableness of an advance in rates filed with the Commission by carriers is not in the nature of a private litigation between the parties who are complainants, and the carriers, but is a matter of public concern in which the whole body of shippers who are compelled to pay the unjust rate are interested. Such proceedings inure to the benefit of not only those who are complainants, but all others not named as complainants who were affected by the unjust rate. A general finding and order declaring a rate unreasonable, may be taken advantage of by other shippers through appropriate proceedings before the Commission or the courts.<sup>65</sup>

65. *Phillips Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. 444, in which the court said: "The Phillips Company, relying on a finding by the Commission on the complaint of the Yellow Pine Association, that a 2 cents advance in a lumber rate was unreasonable, brought suit against four carriers to recover an overcharge collected on 90,432,500 pounds of lumber shipped to it over their connecting lines. But as the plaintiff was

not a party before the Commission the defendants insist that it cannot take advantage of the order that the rate was unjust, so as to be able to maintain the present suit. But the proceeding before the Commission, to determine the reasonableness of the 2 cents advance, was not in the nature of private litigation between a Lumber Association and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry



§ 298. **Findings of Fact Required When Commission Awards Damages Against a Carrier.** In all complaints for damages prosecuted before the Commission against a common carrier for a violation of any of the provisions of the Act, the statute requires the Commission to make a report in writing in respect thereto, which shall state the conclusions of the Commission together with its decision and order. If damages are awarded, the report of the Commission shall include the findings of fact on which the award is made.<sup>66</sup> The order must also direct the carrier to pay to the complainant the sum to which he is entitled on or before a day named therein.<sup>67</sup>

The statute does not require that the report contain the evidential or primary facts—a finding of the ultimate facts is sufficient.<sup>68</sup> “Another objection,” said the court in the Meeker case, cited, “which was directed against the orders as well as the reports is that they contain no findings of fact or at least not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts, that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts

as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure. The plaintiff and every other shipper

similarly situated were entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order.”

66. Section 14 of the Act to Regulate Commerce, appendix A, *infra*.

67. Section 16 of the Act to Regulate Commerce, appendix A, *infra*.

68. *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 59 L. Ed. 1414, 35 Sup. Ct. 888; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, Ann. Cas. 1916B 691.



may be determined. We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts—a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute and that the facts stated in the findings, if taken as *prima facie* true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say 'should be' because both were made in the same proceeding and the later one affirmatively shows that it was made to supplement and give effect to the original."

**§ 299. Statute Prescribing Findings and Orders of Commission Prima Facie Evidence of Facts Therein Stated, Constitutional.** The seventh amendment to the Constitution of the United States provides that in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall

be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States.<sup>69</sup> The fifth amendment provides that no person shall be deprived of his liberty or property without due process of law.

The provision of Section 16 of the Interstate Commerce Act which prescribes that in proceedings for damages before the Commission, the findings and orders of the Commission shall be *prima facie* evidence of the facts therein stated, is not repugnant to either of the foregoing constitutional provisions.<sup>70</sup> "This provision," said the court in the Meeker case, cited, "only established a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained. *Pillow v. Roberts*, 13 How. 472, 476; *Marx v. Hanthorn*, 148 U. S. 172, 182; *Turpin v. Lemon*, 187 U. S. 51, 59; *Cooley's Constitutional Limitations*, 7th ed. 525, as have many other state and Federal enactments establishing other rebuttable presumptions. *Mobile etc., Railroad v. Turnispeed*, 219 U. S. 35, 42; *Lind-*

69. *Lloyd v. Dollison*, 194 U. S. 445, 48 L. Ed. 1062, 24 Sup. Ct. 703; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. 718; *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. 581; *Iowa Cent. Ry. Co. v. State*, 160 U. S. 389, 40 L. Ed. 467, 16 Sup. Ct. 344; *Rogers v. United States*, 141 U. S. 548, 35 L. Ed. 853, 2 Sup. Ct. 91; *Scott v. Neely*, 140 U. S. 106, 35 L. Ed.

358, 11 Sup. Ct. 712; *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76, 35 L. Ed. 371, 11 Sup. Ct. 720; *Wilson v. Everett*, 139 U. S. 616, 35 L. Ed. 286, 11 Sup. Ct. 664; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. Ed. 436.

70. *Pennsylvania R. Co. v. W. F. Jacoby & Co.*, 242 U. S. 89, 61 L. Ed. 165, 37 Sup. Ct. 49; *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, *Ann. Cas.* 1916B 691.

sley v. Natural Carbonic Gas Co., 220 U. S. 61, 81; Reitler v. Harris, 223 U. S. 437; Luria v. United States, 231 U. S. 9, 25. An instructive case upon the subject is Holmes v. Hunt, 122 Massachusetts, 505, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury. And in Chicago, etc., Railroad v. Jones, 149 Illinois, 361-382, a like ruling was made in respect of a statutory provision similar to that now before us."

**§ 300. Commission May Order Reparation without Prescribing Maximum Rate to be Observed in the Future.** The Circuit Court of Appeals in Denver & R. G. R. Co. v. Baer Bros. Mercantile Co.,<sup>71</sup> decided that the Interstate Commerce Commission could not make an order of reparation unless at the same time, and as a part of such order, it fixed a rate to be charged in the future; but on writ of error to the Supreme Court, that tribunal held that an order of reparation was valid, although the Commission had not therein fixed a new and just rate for the future.<sup>72</sup> "That the two subjects of Reparation and Rates," said Mr. Justice Lamar, "may be dealt with in one order is undoubtedly true. Texas & Pac. Ry. v. Abilene, 204 U. S. 426, 446. Robinson v. Balt. & Ohio R. R., 222 U. S. 506, 509. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its *quasi*-judicial capacity to measure past injuries sustained by a private shipper; the other, in its *quasi*-legislative capacity, to prevent future injury to the public. But testimony showing the

71. 109 C. C. A. 337, 187 Fed. 485. Denver & R. G. R. Co., 233 U. S.

72. Baer Bros. Mercantile Co. v. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641.



unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order. This, however, is not necessarily so. Indeed, under the original Commerce Act, the two matters could not possibly be combined in a single order for the reason that, while at that time the Commission could order the carrier to desist from unreasonable practices and award damages, it could not fix rates. This brought about an anomalous state of affairs. For if the shipper obtained his order of reparation because of unreasonable charges which the Railroad Company was ordered to discontinue, a slightly different, but still unreasonable, rate might be put in for the future, which the shipper had to pay and again institute proceedings for reparation. Section 15, Act of February 4, 1887, c. 104, 24 Stat. 379, 384. This situation was dealt with by the Hepburn Act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. Sections 4, 5, act of June 29, 1906, c. 3591, 34 Stat. 584, 589, 590. Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the *quasi*-judicial order for reparation depend for its validity upon being joined with a *quasi*-legislative order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation and not to a new rate; or to a new rate and not to reparation. For example, sec. 13 (24 Stat. 383) permits 'any mercantile, agricultural or manufacturing society or any body public or municipal organization to make complaints against the carrier.' On the application of such bodies, old rates might be declared unjust and new rates established, but, of course, no reparation would be given, for the reason that such complainants were not shippers and, therefore, not entitled to an award of pecuniary



damages. Cf. *Louisville, etc., R. R. v. Int. Com. Comm.*, 227 U. S. 88. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is ordered even though a new rate be established for the future. *Anadarko Cotton Oil Co. v. Atchison, etc., Ry.*, 20 I. C. C. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded for past unreasonable charges collected but no new rate would be established for the future. It may, however, be said that even in such a case, the order while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional and that the absence of a provision for one need not operate to invalidate an order as to the other. This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or he might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future. Or, the Commission might be in position to say with certainty that the rates had been unreasonable and award reparation accordingly, but it might require a protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding and deprive him of

his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions. The present case illustrates some of these features. The plaintiff's petition asked for reparation and that the Commission would establish just rates. On the hearing it appeared that there was no through route or joint rate and that the established local charge of one of the carriers was just while that of the other had not been established or included in a filed tariff and was also unjust. The evidence was sufficient to sustain a finding of damages against such carrier, but it did not show how the through rate should be divided between the two companies, one of which hauled 923 miles and the other 160 miles. The carriers did not ask for an extension of the time within which the reparation should be paid. The fact that they were given an opportunity to agree on a through rate and how it should be divided, ought not to deprive plaintiff of its rights to damages for the past, under a reparation order which could not, by any possibility, be changed by any subsequent finding as to rates for the future."

**§ 301. Actions to Enforce Orders of Commission Awarding Damages may be Prosecuted in State as well as Federal Courts.** When a statute creates a right and designates the court in which it is to be enforced, other courts have then no jurisdiction to award damages thereunder.<sup>73</sup> Prior to 1910, section 16 of the Act provided that suits to enforce the orders of the Commission might be filed in the federal courts. The state courts, therefore, had no jurisdiction of such claims.<sup>74</sup> One of the

73. *Carlisle v. Missouri Pac. Ry. Co.*, 168 Mo. 652, 68 S. W. 898; *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302, 4 Ann. Cas. 770, 83 S. W. 362.

74. *United States. Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Union Pac. R. Co. v. Oregon-Washington Lumber Manu-*

*facturers' Ass'n*, 91 C. C. A. 51, 165 Fed. 13; *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Ass'n*, 91 C. C. A. 39, 165 Fed. 1; *Sheldon v. Wabash R. Co.*, 105 Fed. 785.

*California. Olcovitch v. Grand Trunk R. Co. of Canada*, 20 Cal. App. 349, 129 Pac. 290.

amendments, passed as a part of the Mann-Elkins Act of 1910, provides that the complainant, in his suit to enforce an order of the Commission for damages, may file his suit in any state court of general jurisdiction having jurisdiction of the parties.

**§ 302. Complaints for Damages before Commission must be Filed within Two Years.** Before the amendment of 1906 the Interstate Commerce Act contained no provision limiting the time within which proceedings before the Commission or actions in court for a violation of the Act should be instituted. The statutes of limitations of the states, where an action was prosecuted, therefore, controlled in the absence of a federal statute of limitation.<sup>75</sup> But section 16 of the Act, as amended in 1906, provides that all complaints for the recovery of damages before the Commission shall be filed within two years from the time the cause of action accrued, and not after, and a petition for the payment of money shall be filed in court within one year from the date of the order, and not after.<sup>76</sup> A cause of action for the re-

**Georgia.** *Western & A. R. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644.

**Louisiana.** *Copp v. Louisville & N. R. Co.*, 43 La. Ann. 511, 12 L. R. A. 725, 26 Ann. St. Rep. 198, 9 So. 441.

**Nebraska.** *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. 838.

**West Virginia.** *Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 403, 63 S. E. 323.

**Wisconsin.** *Bichlmeir v. Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 508; *Siggins v. Chicago & N. W. R. Co.*, 153 Wis. 122, 140 N. W. 1128.

75. *O'Sullivan v. Felix*, 233 U. S. 318, 58 L. Ed. 980, 34 Sup. Ct. 596; *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, 25 Sup. Ct. 410, 3 Ann. Cas. 500; *Brady v.*

*Daly*, 175 U. S. 148, 44 L. Ed. 109, 20 Sup. Ct. 62; *Campbell v. City of Haverhill*, 155 U. S. 610, 39 L. Ed. 280, 15 Sup. Ct. 217; *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. Ed. 1080, 9 Sup. Ct. 690; *Ratican v. Terminal R. R. Ass'n of St. Louis*, 114 Fed. 666; *Murray v. Chicago & N. W. Ry. Co.*, 35 C. C. A. 62, 92 Fed. 868; *Copp v. Louisville & N. Ry. Co.*, 50 Fed. 164.

76. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, Ann. Cas. 1916B 691, in which the court said: "Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies. One of these



recovery of damages for unreasonable charges under the Act to Regulate Commerce accrues not from the date a shipment was received or delivered by the carrier, but from the *date* the freight charges *were actually paid*.<sup>76a</sup> The filing of an informal complaint before the Commission covering a particular shipment is sufficient to interrupt the running of the statute even though the formal complaint upon which an order is subsequently based, is not filed for more than two years after the delivery of

is Rev. Stat., Sec. 1047, which places a limitation of five years upon any 'suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States.' The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such. Here the liability sought to be enforced was not punitive but strictly remedial, as is shown by sections 8, 9, 14 and 16 of the Act to Regulate Commerce. So sec. 1047 was not applicable. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 397; *O'Sullivan v. Felix*, 233 U. S. 318; *Huntington v. Attrill*, 146 U. S. 657, 666-669; *Brady v. Daly*, 175 U. S. 148. Next in order is a Pennsylvania statute containing a limitation of six years. 2 Stewart's Purdon's Digest, 13th ed. 2282. It could apply only in the absence of a controlling Federal statute. Rev. Stat. sec. 721; *Campbell v. Haverhill*, 155 U. S. 610; *McClaine v. Rankin*, 197 U. S. 154, 158; *O'Sullivan v. Felix*, *supra*. Such a statute was adopted and put in force before any part of either claim fell with-

in the bar of the local limitation. By the act of June 29, 1906, c. 3591, 34 Stat. 584, 590, Congress amended sec. 16 of the Act to Regulate Commerce by incorporating therein the following limitations: 'All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this Act may be presented within one year.' The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several States and subject them to limitations of its own creation which would operate alike in all the States."

76a. *United States v. Interstate Commerce Commission*, — U. S. —, 62 L. Ed. —, — Sup. Ct. —, decided April 29, 1918.



the shipment.<sup>77</sup> But the filing of a complaint by voluntary association of lumber manufacturers does not interrupt the running of the statute as to those members not named in the complaint.<sup>78</sup>

A shipper cannot take advantage of proceedings of other shippers for reparation so as to prevent the running of the statute against him.<sup>79</sup> "But while every person," said the court in the last case cited, "who had paid the rate could take advantage of the finding that the evidence was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others. If he failed to take either of those steps and there was a finding of unreasonableness in the proceedings begun by others, he could, if in time, present his claim, and wait the result of the litigation over the validity of any order made at the instance of those parties. If it was ultimately sustained by the court as valid he would then be in position to obtain reparation from the Commission—or a judgment from a court of competent jurisdiction, on a claim that had been seasonably presented. But neither proceedings begun by other shippers, nor findings of unreasonableness and orders issued thereon by the Commission, would save the rights of those who disregarded the requirements of the Hepburn Amendment, that, 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after; provided, that claims accrued prior to the passage of this act may be presented within one year.' 34 Stat. 586. In the present case the overcharges

77. *International Agr. Corporation v. Louisville & N. R. Co.*, 29 I. C. C. 391.

78. *Michigan Hardwood Manufacturers Ass'n v. Transcontinent-*

*tal Freight Bureau*, 27 I. C. C. 32.

79. *Phillips & Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, 59 L. Ed. 774, 35 Sup. Ct. 444.

were made and paid prior to August, 1904. The present suit was brought May 9, 1909,—less than two years after the validity of the Commission's order was sustained by the Supreme Court,—but, more than one year after the passage of the Hepburn Amendment, and more than four years after the plaintiff's cause of action arose." A claim must therefore be filed with the Commission within two years by some person entitled either in law or in equity to prosecute and recover on account of that claim.<sup>80</sup>

**§ 303. Assignability of Claims for Damages under the Interstate Commerce Act.** In *Edmunds v. Illinois Cent. R. Co.*,<sup>81</sup> the court held that claims for damages under the provisions of the Interstate Commerce Act constituted property rights which might be assigned and that suits therefor were maintainable by the consignee; but, in a conference ruling,<sup>82</sup> the Commission held that in awarding reparation it will recognize an assignment by a consignor to a consignee or by a consignee to a consignor, but will not recognize an assignment to a stranger to the transportation records.

**§ 304. Allowance of Attorney's Fees for Services in Reparation Cases Before Commission not Permitted.** When a person recovers damages against a carrier for a violation of any of the provisions of the Interstate Commerce Act, it is provided in Section 8 that, in addition thereto, the carrier is liable for a reasonable counsel or attorney's fee to be fixed by the court in every case of a recovery, which shall be taxed and collected as a part of the costs in the case. Section 16, relating to actions to enforce claims for damages after the Commission has acted thereon, provides that if the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. These provisions contemplate that only when the damages are recovered by suit in a court that

80. *Missouri & Kansas Shippers' Ass'n v. Atchison, T. & S. F. Ry. Co.*, 13 I. C. C. 411.

81. 80 Fed. 78.

82. Conference Rule No. 363.

a fee is to be allowed. If, therefore, a carrier complies with an order of the Commission regulating damages before the claimant proceeds to enforce the order by an action in court, an attorney's fee cannot be taxed as a part of the costs.<sup>83</sup> The provision allowing an attorney's fee does not apply to actions by shippers against an initial carrier under the Carmack amendment because the cause of action is not a violation of the act but the loss or damage to the property.<sup>84</sup>

83. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 59 L. Ed. 644, 35 Sup. Ct. 328, Ann. Cas. 1916B 691.

84. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

## CHAPTER XV

### LIABILITIES FOR LOSS AND DAMAGES TO INTERSTATE SHIPMENTS—CARMACK AMENDMENT.

- Sec. 305. Initial Carriers Liable for Loss and Damage to Property Moving in Interstate Commerce.
- Sec. 306. Constitutionality and Validity of the Carmack Amendment.
- Sec. 307. Law Governing Duties of Carriers for Loss or Damage to Interstate Shipments Prior to 1906.
- Sec. 308. Purpose of Congress in the Enactment of the Carmack Amendment.
- Sec. 309. Stipulations Exempting Initial Carrier from Liability for Loss and Damage on Connecting Lines Invalid.
- Sec. 310. All State Laws and Rules Regulating Liabilities for Loss and Damage, Superseded as to Interstate Shipments.
- Sec. 311. Decisions of Federal Courts Control in Construing Carmack Amendment.
- Sec. 312. State Courts may Enforce Provisions of Carmack Amendment and Award Damages Thereunder.
- Sec. 313. Actions Brought in State Courts under Carmack Amendments not Removable, When.
- Sec. 314. Initial Carrier may not be Sued in Domicile of Terminal Carrier.
- Sec. 315. Receipt from Shipper of Money Paid by Initial Carrier Binding upon Connecting Carrier in Absence of Fraud.
- Sec. 316. Recovery Against Initial Carrier Bars an Action Against Connecting Carriers.

§ 305. **Initial Carriers Liable for Loss and Damage to Property Moving in Interstate Commerce.** In 1906 Congress passed an amendment to section 20 of the Act to Regulate Commerce which is popularly known as the Carmack amendment.<sup>1</sup> It provides that any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or a bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier,

1. Act of June 29, 1906, 34 Stat. at L. 593. See Section 69, *supra*.



railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass and that no contract, receipt, rule or regulation shall exempt such company from the liability imposed by the statute.<sup>2</sup>

The significant and dominating features of the Carmack amendment as originally enacted were: First. It affirmatively required the initial carrier to issue a receipt or bill of lading when it received property for transportation from a point in one state to a point in another.<sup>3</sup> Second. Such initial carrier is made liable to the lawful holder thereof for any loss, damage or injury to such property caused by it.<sup>4</sup> Third. It is

2. The changes made in this amendment by the first and second Cummins amendment should be carefully noted. Section 317, *infra*.

3. **United States.** *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 593.

**Illinois.** *Looney v. Oregon Short Line R. Co.*, 271 Ill. 538, 111 N. E. 509.

**Indiana.** *Chesapeake & O. Ry. Co. of Indiana v. Jordan*, — Ind. App. —, 114 N. E. 461.

**Massachusetts.** *Aradalou v. New York, N. H. & H. R. Co.*, 225 Mass. 235, 114 N. E. 297.

**Missouri.** *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Keithley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756; *Kent v. Chicago, B. & Q. R. Co.*, 189 Mo. App. 424, 176 S. W. 1105; *Morrison Grain Co. v. Missouri Pac. R. Co.*, 182 Mo. App. 339, 170 S. W. 404.

**New Jersey.** *International Watch Co. v. Delaware, L. & W. R. Co.*, 30 N. J. L. 553, 78 Atl. 49.

**Wisconsin.** *Aton Piano Co. v. Chicago, M. & St. P. Co.*, 152 Wis. 156, 139 N. W. 743.

"By this legislation, the carrier is required to have a written shipping contract and cannot ship without one." *Kent v. Chicago, B. & Q. R. Co.*, *supra*.

4. **United States.** *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, L. R. A. 1917A 197; *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 226 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; *Wells, Fargo & Co. v. Neiman-Marcus*, 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205.

**Florida.** *Seaboard Air Line Ry. Co. v. Mullin*, 70 Fla. 450, 11 N. C. C. A. 1, L. R. A. 1916D 982, Ann. Cas. 1918A 576, 70 So. 467.

also made liable for any loss, damage or injury to such property by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.<sup>5</sup>

**Georgia.** *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865.

• **Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 45 L. R. A. (N. S.) 529, 156 S. W. 400.

**Maine.** *Ross v. Maine Cent. R. Co.*, 112 Me. 63, 90 Atl. 711.

**Missouri.** *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131.

**New Jersey.** *Florman v. Dodd & Childs Exp. Co.*, 79 N. J. L. 63, 74 Atl. 446.

**New York.** *Barstow v. New York, N. H. & H. R. Co.*, 158 N. Y. App. Div. 665, 143 N. Y. Supp. 983; *Shultz v. Skaneateles R. Co.*, 122 N. Y. Supp. 445.

**Oklahoma.** *Missouri, O. & G. Ry. Co. v. French*, — Okla. —, 152 Pac. 591; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 6 N. C. C. A. 717, 135 Pac. 406.

**Rhode Island.** *Glenlyon Dye Works v. Interstate Exp. Co.*, 36 R. I. 558, 91 Atl. 5.

**Texas.** *Stevens & Russell v. St. Louis Southwestern Ry. Co.*, — Tex. Civ. App. —, 178 S. W. 810.

5. **United States.** *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462; *Pennsylvania R. Co. v. Olivit Bros.*, 243 U. S. 574, 61 L. Ed. 908, 37 Sup. Ct. 468; *Western Transit Co. v. A. C. Leslie & Co.*, 242 U. S. 448, 61 L. Ed. 423, 37 Sup. Ct. 133; *Chesapeake & O. R. Co. v. Mc-*

*Laughlin*, 242 U. S. 142, 61 L. Ed. 207, 37 Sup. Ct. 40; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541; *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U. S. 34, 60 L. Ed. 511, 36 Sup. Ct. 230, L. R. A. 1917A 193; *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Cunningham Commission Co.*, 125 Ark. 577, 188 S. W. 1177.

**Delaware.** *Bowden v. Philadelphia, B. & W. R. Co.*, 5 Boyce's (Del.) 146, 91 Atl. 209.

**Georgia.** *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865.

**Idaho.** *Barrett v. Northern P. R. Co.*, 29 Idaho 139, 157 Pac. 1016.

**Indiana.** *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839.

**Louisiana.** *Burkenroad Goldsmith Co. v. Illinois Cent. R. Co.*, 138 La. 81, Ann. Cas. 1917C 935, 70 So. 44.

**Michigan.** *Perkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607; *Sturges v. Detroit, G. H. & M. R. Co.*, 166 Mich. 231, 131 N. W. 706.

**Missouri.** *Jones v. Louisville & N. R. Co.*, — Mo. App. —, 182 S. W. 1064.

Fourth. It affirmatively declares that no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability imposed by the statute.<sup>6</sup>

**§ 306. Constitutionality and Validity of the Carmack Amendment.** Soon after the enactment of the Carmack amendment, its constitutionality was attacked

**Oklahoma.** *St. Louis & S. F. R. Co. v. Mounts*, 44 Okla. 359, 144 Pac. 1036.

**South Carolina.** *Van Epps v. Atlantic Coast Line R. Co.*, 105 S. C. 406, 89 S. E. 1035.

**Texas.** *Texas-Mexican Ry. Co. v. Sutherland*, — Tex. Civ. App. —, 189 S. W. 983; *Patton v. Texas & P. Ry. Co.*, — Tex. Civ. App. —, 137 S. W. 721; *Missouri, K. & T. R. Co. of Texas v. Stark Grain Co.*, 103 Tex. 542, 131 S. W. 410.

**Washington.** *Coovert v. Spokane, P. & S. R. Co.*, 80 Wash. 87, 141 Pac. 324.

6. **United States.** *New York Cent. & H. River R. Co. v. Beaham*, 242 U. S. 148, 61 L. Ed. 210, 37 Sup. Ct. 43; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; *Oregon Short Line R. Co. v. Homer*, 235 U. S. 693, 59 L. Ed. 429, 35 Sup. Ct. 207; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526; L. R. A. 1915B 450. Ann. Cas. 1915D 593; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205.

**Alabama.** *Central of Georgia R. Co. v. Patterson*, 12 Ala. App. 369, 68 So. 513; *Central of Georgia R. Co. v. Broda*, 190 Ala. 266, 67 So. 437; *Atlantic Coast Line R. Co. v. Ward*, 4 Ala. App. 374, 58 So. 677.

**Delaware.** *Bowden v. Philadelphia, B. & W. R. Co.*, 5 Boyce's (Del.) 146, 91 Atl. 209.

**Indiana.** *Pittsburgh, C., C. & St. L. R. Co. v. Knox*, 177 Ind. 344, 98 N. E. 295; *Pittsburgh, C., C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

**Iowa.** *Erisman v. Chicago, B. & Q. R. Co.*, — Iowa —, 163 N. W. 627; *Blair & Jackson v. Wells, Fargo & Co.*, 155 Iowa 190, 135 N. W. 615.

**Michigan.** *Parkett v. Manistee & N. E. R. Co.*, 175 Mich. 253, 141 N. W. 607.

**Mississippi.** *Southern Pac. R. Co. v. A. J. Lyon & Co.*, 107 Miss. 777, Ann. Cas. 1917D 171, 66 So. 209.

**North Carolina.** *Pace Mule Co. v. Seaboard Air Line R. Co.*, 160 N. C. 215, 76 S. E. 513; *Herring v. Atlantic Coast Line R. Co.*, 160 N. C. 252, 76 S. E. 527.

**North Dakota.** *Cook v. Northern Pac. R. Co.*, 32 N. D. 340, L. R. A. 1916D 345, 155 N. W. 867.

**Oklahoma.** *Haskell v. St. Louis & S. F. R. Co.*, — Okla. —, 162 Pac. 459; *St. Louis & S. F. R. Co. v. Cox, Peery & Murray*, 40 Okla. 258, 138 Pac. 144.



in many state courts on the ground that its provisions deprived carriers of their property without due process of law, interfered with the liberty of contract, and was an improper exercise of the power of Congress under the commerce clause; but its validity was sustained almost without dissent.<sup>7</sup> The constitutionality of the amendment was first passed upon by the United States Supreme Court in *Atlantic Coast Line R. Co. v. Riverside Mills*,<sup>8</sup> and the decision in that case was subsequently affirmed in the cases cited.<sup>9</sup> In the *Riverside Mills* case, it was held that the statute, in prohibiting an initial carrier from exercising its former right under the common law to make a contract limiting its liability to its own line, was not a denial of the liberty of contract secured by the Fifth amendment to the national Constitution for the reason that the government may deny liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interest.

**Tennessee.** *Louisville & N. R. Co. v. Hobbs*, 136 Tenn. 512, 190 S. W. 461.

**Utah.** *Shay v. Union Pac. R. Co.*, 47 Utah 252, 153 Pac. 31.

7. **Arkansas.** *St. Louis & S. F. R. Co. v. Heyser*, 95 Ark. 412, Ann. Cas. 1912A 610, 130 S. W. 562.

**Illinois.** *Fry v. Southern Pac. Co.*, 247 Ill. 564, 93 N. E. 906.

**Indiana.** *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 102 N. E. 34, 103 N. E. 839; *Pittsburgh, C., C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

**Kentucky.** *Louisville & N. R. Co. v. Scott*, 133 Ky. 724, 19 Ann. Cas. 392, 118 S. W. 990.

**Michigan.** *Sturges v. Detroit, G. H. & M. R. Co.*, 166 Mich. 231, 131 N. W. 706.

**Minnesota.** *Ford v. Chicago, R. I. & P. R. Co.*, 123 Minn. 87, 143 N. W. 249; *Dodge v. Chicago, St. P.*

*M. & O. R. Co.*, 111 Minn. 123, 126 N. W. 627.

**New York.** *Welch Lumber Co. v. Norfolk & W. R. Co.*, 137 N. Y. App. Div. 248, 121 N. Y. Supp. 985.

**Texas.** *Missouri, K. & T. Ry. Co. of Texas v. Harriman Bros.*, — Tex. Civ. App. —, 128 S. W. 932; *Galveston, H. & S. A. Ry. Co. v. Crow* (Tex. Civ. App.) 117 S. W. 170; *Galveston, H. & S. A. Ry. Co. v. Wallace*, (Tex. Civ. App.) 117 S. W. 169; *Galveston, H. & S. A. R. Co. v. F. A. Piper Co.*, 52 Tex. Civ. App. 568, 115 S. W. 107.

**Virginia.** *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 111 Va. 813, 69 S. E. 1106.

8. 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

9. *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609; *Galves-*



Answering the contention that the amendment was invalid because beyond the power of Congress under the commerce clause, the court held that its provisions prescribed a rule under which interstate commerce might be conducted, and was, therefore, within the range of congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful. The statute, the court decided, was embraced within the grant of power conferred upon Congress to use all lawful means necessary to the execution of the power to regulate commerce. The act was held to be as directly applicable to commerce as the Safety Appliance Act, regulating the agencies of commerce, and the Anti-Trust Act, embracing contracts in restraint of trade between the states. Although the statute requires the carrier to accept goods destined beyond its line for delivery and to issue a through bill of lading, such compulsory acceptance and liability for damages done by others, is not a taking of the carrier's property without due process of law.<sup>10</sup> "It must be conceded," said the court in the *Riverside Mills Case*, "that the effect of the act in respect of carriers receiving packages in one State for a point in another and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line. This it is said is a denial of the liberty of contract secured by the Fifth Amendment to the Constitution. To support this counsel cite such cases as *Allgeyer v. Louisiana*, 165 U. S. 589; *Lochner v. New York*, 198 U. S. 45, and *Adair v. United States*, 208 U. S. 161; This power to regulate is the right to prescribe the rules under which such commerce may be conducted. 'It is,' said Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 197, 'a power vested in Congress as absolutely as it would be in a single government having in its power as are found in the Constitution of the United States.' It is a power which extends to the regulation of the appliances and

ton, H. & S. A. R. Co. v. Wallace,  
223 U. S. 481, 56 L. Ed. 516, 32 Sup.  
Ct. 205.

10. *Norfolk & W. R. Co. v. Dixie  
Tobacco Co.*, 228 U. S. 593, 57 L.  
Ed. 980, 33 Sup. Ct. 609.

machinery and agencies by which such commerce is conducted. Thus in *Johnson v. Southern Pac. Ry.*, 196 U. S. 1, an act prescribing safety appliances was upheld. And in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, it was held that the equipment of an interstate railway, including cars used for the transportation of its own fuel, was subject to the regulation of Congress. In *Interstate Commerce Commission v. C. & A. Ry. Co.*, 215 U. S. 479, it was held to extend to the distribution of coal cars to the shipper, so as to prevent discrimination. In *The Employers' Liability Cases*, 207 U. S. 463, 495, power to pass an act which regulated the relation of master and servant, so as to impose on the carrier, while engaged in interstate commerce, liability for the negligence of a fellow-servant, for which at common law there was no liability, and depriving such carrier of the common-law defense of contributory negligence save by way of reduction of damages, was upheld. In *Addyston Pipe Co. v. United States*, 175 U. S. 211, and *Northern Securities Co. v. United States*, 193 U. S. 197, it was held that this power of regulation extended to and embraced contracts in restraint of trade between the States. It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself. Having the express power to make rules for the conduct of commerce among the States, the range of Congressional discretion as to the

regulation best adapted to remedy a practice found inefficient or hurtful, is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed. 'The test of power,' said Mr. Justice White, speaking for this court in the Employers' Liability Cases, cited above, 'is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce.' That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as



between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.”

§ 307. **Law Governing Duties of Carriers for Loss or Damage to Interstate Shipments Prior to 1906.** Prior to the enactment of the Carmack amendment which makes the initial carrier liable for loss, damage or injury to through shipments, whether such losses occur on or off the line of the initial carrier, the rule of the carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as enforced in the federal courts throughout the country,<sup>11</sup> or that determined by the supposed public policy of a particular state,<sup>12</sup> or that prescribed by the statutory law of a particular state.<sup>13</sup>

State statutes containing reasonable regulations which did not constitute direct burdens upon interstate commerce, were held to be valid and enforceable even as to shipments from one state to another. For example, a Virginia statute prescribing that a common carrier accepting for transportation property directed to a point of destination beyond the terminus of its own line, should thereby be deemed to assume an obligation for its safe carriage to such point of destination, unless released from such liability by a contract signed by the owner, was held to be valid and applicable to

11. *Primrose v. Western U. Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. 1098; *New York, I. E. & W. R. Co. v. Estill*, 147 U. S. 591, 39 L. Ed. 292, 13 Sup. Ct. 444; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788, 9 Sup. Ct. 469; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873, 6 Sup. Ct. 750, 1176; *Hart v. Penn-*

*sylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151; *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107, 18 L. Ed. 170.

12. *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132.

13. *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289.



interstate shipments.<sup>14</sup> A Missouri law providing that a railroad company issuing a bill of lading should be liable for any loss or damage to property caused by its own or the negligence of a succeeding carrier, was sustained even as to a shipment from Missouri to Illinois.<sup>15</sup> But a Georgia act prescribing that when freight has been delivered for transportation by two or more carriers, the initial carrier, upon the application of the shipper, must furnish information in writing stating when, where and how, and by which carrier the freight was lost, damaged or destroyed and the names of the agents by whom the truth of such facts could be established, was an unlawful regulation of interstate commerce.<sup>16</sup>

With such diversity of legislative enactments and judicial holdings, neither uniformity of obligation nor of liability existed as to interstate and foreign shipments. Radical differences existed even in the interpretation of the common law liability of interstate carriers as to loss and damage to interstate shipments. Thus, in *Hart v. Pennsylvania R. Co.*,<sup>17</sup> the national Supreme Court held that a contract fairly made and entered into between a carrier and a shipper agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assumed liability only to the extent of such agreed valuation in case of loss by the negligence of the carrier, was valid; while the supreme court of Pennsylvania, on the other hand, in administering the common law according to its understanding and interpretation of it, denied the right of a carrier to thus limit its liability for loss or damage resulting from negligence.<sup>18</sup>

14. *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 42 L. Ed. 759, 18 Sup. Ct. 335.

15. *Missouri, K. & T. Ry. Co. v. McCann*, 174 U. S. 580, 43 L. Ed. 1093, 19 Sup. Ct. 755.

16. *Central of Georgia R. Co. v. Murphey*, 196 U. S. 194, 49 L. Ed. 444, 25 Sup. Ct. 218, 2 Ann. Cas. 514.

17. 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151.

18. *Jones v. Lehigh & N. E. R. Co.*, 202 Pa. 81, 51 Atl. 590.

The American courts had also held that an initial carrier, receiving property for shipment to a point beyond its own line and on the line of a succeeding carrier, might refuse to assume responsibility for safe carriage further than the terminus of its own line, and that a provision in a shipping contract providing that the initial carrier should not be liable for loss or damage not occurring on its own portion of a through route, was valid, and not a contract for exemption from a carrier's liability as such.<sup>19</sup>

**§ 308. Purpose of Congress in the Enactment of the Carmack Amendment.** One of the reasons which induced the passage of the Carmack amendment was the desire of Congress to obliterate the diversity of liability of interstate carriers as to loss and damage claims arising out of interstate shipments and to establish one uniform

19. **United States.** *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7; *Southern Pac. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. Ed. 585, 26 Sup. Ct. 330; *Louisville & N. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. 745; *Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 39 L. Ed. 176, 15 Sup. Ct. 136; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. 185; *Myrick v Michigan Cent. R. Co.*, 107 U. S. 102, 27 L. Ed. 325, 1 Sup. Ct. 425; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 22 L. Ed. 827.

**California.** *Cavallaro v. Texas & P. Ry. Co.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

**Florida.** *Savannah, F. & W. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 So. 544.

**Iowa.** *Hartley v. St. Louis, K. & N. W. R. Co.*, 115 Iowa 612, 89 N. W. 88.

**Maine.** *Taylor v. Maine Cent. R. Co.*, 87 Me. 299, 32 Atl. 905.

**Maryland.** *Hoffman v. Cumberland Valley R. Co.*, 85 Md. 391, 37 Atl. 214.

"Such a provision is not a contract for exemption from a carrier's liability as such, but a provision making plain that it did not assume the obligation of a carrier beyond its own line, and that each succeeding carrier in the route was but the agent of the shipper for a continuance of the transportation. It is therefore obvious that at the common law an initial carrier under such a state of facts would not be liable for a loss through the fault of a connecting carrier to whom it had, in due course, safely delivered the goods for further transportation." *Atlantic Coast Line R. Co. v. Riverside Mills, supra.*

rule of liability throughout the United States.<sup>20</sup> The aim was to establish unity of responsibility.<sup>21</sup> But the overshadowing purpose of Congress in passing the amendment was to remove the burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers. Under the common law, as explained in the foregoing paragraph, each carrier participating in a through shipment, could limit its liability for loss or damage to that occurring on its own lines. Shippers of goods over two or more lines were therefore compelled to ascertain when and where their property was lost or damaged in order to recover against the carrier causing the damage.

The obstacles in attempting to determine responsibility for damage to property shipped over different lines were frequently insurmountable, and, in many instances, shippers were remediless. Congress recognized the difficulties involved on the part of shippers when goods were lost, in tracing the goods, fixing the liability and recovering their damage.<sup>22</sup> But, on the other hand, the facilities of an initial carrier were found to be much greater than those of the shippers for locating the goods and fixing the liability for loss or damage and the proviso permitting the initial carrier to recover from the carrier on whose lines the loss occurred the amount

20. *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U. S. 34, 60 L. Ed. 511, 36 Sup. Ct. 230, L. R. A. 1917A 193; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

21. *Georgia, F. & A. R. Co. v.*

*Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541.

22. *Georgia. Southern Ry. Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418.

*Illinois. Looney v. Oregon Short Line R. Co.*, 271 Ill. 538, 111 N. E. 509.

*Missouri. Donovan v. Wells, Fargo & Co.*, 265 Mo. 291, 177 S. W. 839.

*New Jersey. Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379.

*Texas. Pecos & N. T. Ry. Co. v. Meyer*, — Tex. Civ. App. 155, S. W. 309.



of damages paid to the owner of the property adequately protected the initial carrier.<sup>23</sup> The object of the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of destination, using the lines of the connecting carriers as its agents, thus securing for the shippers unity of transportation and responsibility.<sup>24</sup>

**§ 309. Stipulations Exempting Initial Carrier from Liability for Loss and Damage on Connecting Lines Invalid.** It necessarily follows from the language of the Carmack amendment that all stipulations in bills of lading for through shipments exempting the initial carrier from liability for loss or damage not occurring on its own line, are invalid and cannot be enforced, as the statute conclusively treats all the connecting carriers as the agents of the initial carrier for whose act it is liable.<sup>25</sup>

23. When the Carmack amendment was reported by a conference committee, Representative Richardson explained its purpose as follows: "One of the great complaints of the railroads has been—and, I think, a reasonable, just and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing

us to do that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the cooperation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference."

24. *St. Louis Southwestern R. Co. of Texas v. Alexander*, 227 U. S. 218, 57 L. Ed. 486, 33 Sup. Ct. 245. Ann. Cas. 1915B 77.

25. *United States. Smeltzer v. St. Louis & S. F. R. Co.*, 158 Fed. 649.



§ 310. **All State Laws and Rules Regulating Liabilities for Loss and Damage, Superseded as to Interstate Shipments.** The subject matter of the liabilities of common carriers for loss or injury to property transported in interstate commerce belongs to that class of regulations which the state may control in the absence of action by Congress. By enactment of the Carmack amendment, Congress legislated upon the subject, and state laws and rules therefore, in so far as they attempt to and do cover the same field, have been superseded.<sup>26</sup>

**Alabama.** Central of Georgia R. Co. v. Broda, 190 Ala. 266, 67 So. 437; Atlantic Coast Line R. Co. v. Ward, 4 Ala. App. 374, 58 So. 677; Central of Georgia R. Co. v. Sims, 169 Ala. 295, 53 So. 826.

**Arkansas.** United States Exp. Co. v. Cohn, 108 Ark. 115, 157 S. W. 144; Southern Exp. Co. v. Meyer, 94 Ark. 103, 125 S. W. 642.

**Indiana.** Pittsburgh, C., C. & S. L. R. Co. v. Knox, 177 Ind. 344, 98 N. E. 295.

**Iowa.** Glassman v. Chicago, R. I. & P. R. Co., 166 Iowa 254, 147 N. W. 757; Cramer v. Chicago, R. I. & P. R. Co., 153 Iowa, 103, 133 N. W. 387.

**Louisiana.** Burkenroad Goldsmith Co. v. Illinois Cent. R. Co., 138 La. 81, Ann. Cas. 1917C 935, 70 So. 44.

**Michigan.** Perkett v. Manistee & N. E. R. Co., 175 Mich. 253, 141 N. W. 607.

**Mississippi.** Southern Pac. R. Co. v. A. J. Lyon & Co., 107 Miss. 777, Ann. Cas. 1917D 171, 66 So. 209.

**Minnesota.** Dodge v. Chicago, St. P., M. & O. R. Co., 111 Minn. 123, 126 N. W. 627.

**Rhode Island.** Glenlyon Dye Works v. Interstate Exp. Co., 36 R. I. 558, 91 Atl. 5.

**Texas.** Missouri, K. & T. Ry. Co. of Texas v. Hailey, — Tex. Civ.

App. —, 156 S. W. 1119; Chicago, R. I. & G. Ry. Co. v. Scott, — Tex. Civ. App. —, 156 S. W. 294.

**Virginia.** Old Dominion S. S. Co. v. Flanary & Co., 111 Va. 816, 69 S. E. 1107.

26. **United States.** Missouri, K. & T. R. Co. of Texas v. Ward, 244 U. S. 383, 61 L. Ed. 1213, 37 Sup. Ct. 617; St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462; Western Transit Co. v. A. C. Leslie & Co., 242 U. S. 448, 61 L. Ed. 423, 37 Sup. Ct. 133; Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265; Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541; Northern Pac. R. Co. v. Wall, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; Southern Ry. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; Southern Exp. Co. v. Byers, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410; L. R. A. 1917A 197; Cleveland, C. & St. L. R. Co. v. Detlebach, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, Ann. Cas. 1916D 333; Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351; Missouri, K. & T.

That the legislation supersedes all the regulations and policies of a particular state upon the same subject

R. Co. of Texas v. Harris, 234 U. S. 412, 58 L. Ed. 1377, 34 Sup. Ct. 790, L. R. A. 1915E 942; Atchison, T. & S. F. R. Co. v. Moore, 233 U. S. 182, 58 L. Ed. 906, 34 Sup. Ct. 558; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915 D 593; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383; Barrett v. New York, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203; Norfolk & W. R. Co. v. Dixie Tobacco Co., 228 U. S. 593, 57 L. Ed. 980, 33 Sup. Ct. 609; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391; Wells, Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469, 57 L. Ed. 600, 33 Sup. Ct. 267; Chicago, St. P., M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155; Chicago & E. I. R. Co. v. Collins Produce Co., 149 C. C. A. 169, 235 Fed. 857, 14 N. C. C. A. 917.

**Alabama.** Henderson & Walters v. Atlantic Coast Line Ry. Co., — Ala. —, 76 So. 309; Deavors v. Southern Exp. Co., — Ala. —, 76 So. 288; Western U. Tel. Co. v. Smith, — Ala. —, 75 So. 393; Nashville, C. & St. L. Ry. Co. v. Abramson-Boone Produce Co., — Ala. —, 74 So. 350.

**Arkansas.** St. Louis, I. M. & S. R. Co. v. Cunningham Commission Co., 125 Ark. 577, 188 S. W. 1177; Kansas City & M. R. Co. v. Oakley, 115 Ark. 20, 170 S. W. 565;

St. Louis, I. M. & S. R. Co. v. Faulkner, 111 Ark. 430, 164 S. W. 763.

**Georgia.** Southern Exp. Co. v. Oliver, — Ga. App. —, 93 S. E. 109; Central of Georgia R. Co. v. Yesbik, 146 Ga. 769, 92 S. E. 527; Morris v. Southern R. Co., 19 Ga. App. 495, 91 S. E. 878; Cincinnati, H. & D. R. Co. v. Quincy & Rogers, 19 Ga. App. 167, 91 S. E. 220; Central Georgia R. Co. v. Waxelbaum Produce Co., 18 Ga. App. 489, 89 S. E. 635; Nashville, C. & St. L. Ry. v. C. V. Truitt Co., 17 Ga. App. 236, 86 S. E. 421; Mitchell & Co. v. Atlantic Coast Line R. Co., 15 Ga. App. 797, 84 S. E. 227; Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102, 78 S. E. 1019.

**Illinois.** Shellabarger Elevator Co. v. Illinois Cent. R. Co., 278 Ill. 333; L. R. A. 1917E 1011, 116 N. E. 170; Pennington v. Grand Trunk Western R. Co., 277 Ill. 39, 115 N. E. 170; Gamble-Robinson Commission Co. v. Union Pac. R. Co., 262 Ill. 400, Ann. Cas. 1915B 89, 104 N. E. 666; Clingan v. Cleveland, C., C. & St. L. Ry. Co., 184 Ill. App. 202.

**Indiana.** Chesapeake & O. Ry. Co. of Indiana v. Jordan, — Ind. App. —, 114 N. E. 461; Cleveland, C., C. & St. L. R. Co. v. Hayes (Ind.), 104 N. E. 581; Washash R. Co. v. Priddy, 179 Ind. 483, 101 N. E. 724.

**Iowa.** Erisman v. Chicago, B. & Q. R. Co., — Iowa —, 163 I. W. 627; Cedar Rapid Fuel Co. v. Illinois Cent. R. Co., — Iowa —, 160 N. W. 353; Hellman & Clark v. Chicago & N. W. R. Co., 167 Iowa 313, 149 N. W. 436.

results from the general character of the statute; for it embraces the subject of the liability of the carrier under

**Kentucky.** *Southern Ry. Co. v. Avey*, 173 Ky. 598, 191 S. W. 460; *Louisville & N. R. Co. v. Miller*, 156 Ky. 677, 50 L. R. A. (N. S.) 819, 162 S. W. 73; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 153 Ky. 730, 45 L. R. A. (N. S.) 529, 156 S. W. 400.

**Louisiana.** *National Rice Milling Co. v. New Orleans & N. E. R. Co.*, 132 La. 615, Ann. Cas. 1914D 1099, 61 So. 708.

**Maine.** *Continental Paper Bag Co. v. Maine Cent. R. Co.*, — Me. —, 99 Atl. 259.

**Massachusetts.** *Aradalou v. New York, N. H. & H. R. Co.*, 225 Mass. 235, 114 N. E. 297.

**Minnesota.** *Victor Produce Co. v. Western Transit Co.*, 135 Minn. 121, 160 N. W. 248; *Ford v. Chicago, R. I. & P. R. Co.*, 123 Minn. 87, 143 N. W. 249.

**Mississippi.** *St. Louis & S. F. R. Co. v. Woodruff Mills*, 105 Miss. 214, 62 So. 171.

**Missouri.** *Jordan Bros. v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 196 S. W. 417; *Barton v. Louisville & N. R. Co.*, — Mo. App. —, 196 S. W. 379; *O'Briant v. Pryor*, — Mo. App. —, 195 S. W. 759; *Foster Lumber Co. v. Atchison, T. & S. F. R. Co.*, 270 Mo. 629, 194 S. W. 281; *Equity Elevator Co. v. Union Pac. R. Co.*, — Mo. App. —, 191 S. W. 1067; *Collier v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 969; *Wilson v. Chicago Great Western R. Co.*, — Mo. App. —, 190 S. W. 22; *Brockman Commission Co. v. Missouri Pac. R. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Conley v. Chicago, B. & Q. R. Co.*, 192 Mo. App. 534, 183 S. W. 1111; *Donovan*

*v. Wells, Fargo & Co.*, 265 Mo. 291, 177 S. W. 839; *Dunlap v. Chicago & A. R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Bailey v. Missouri Pac. R. Co.*, 184 Mo. App. 457, 171 S. W. 44; *Johnson Grain Co. v. Chicago, B. & Q. R. Co.*, 177 Mo. App. 195, 164 S. W. 182; *American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830.

**New Jersey.** *Olivit Bros. v. Pennsylvania R. Co.*, 88 N. J. L. 241, 96 Atl. 582.

**New York.** *Burke v. Union Pac. R. Co.*, — N. Y. App. Div. —, 166 N. Y. Supp. 100; *Lynch v. New York Cent. & H. River R. Co.*, 89 N. Y. Misc. 472, 153 N. Y. Supp. 633; *Barnet v. New York Cent. & H. River R. Co.*, 167 N. Y. App. Div. 738, 153 N. Y. Supp. 374; *Barnstow v. New York, N. H. & H. R. Co.*, 158 N. Y. App. Div. 665, 143 N. Y. Supp. 983; *Schultz v. Skaneateles R. Co.*, 122 N. Y. Supp. 445.

**North Carolina.** *Davis v. Norfolk Southern R. Co.*, 172 N. C. 209, 90 S. E. 123; *Aydlett v. Norfolk Southern R. Co.*, 172 N. C. 47, 89 S. E. 1000.

**North Dakota.** *Knapp v. Minneapolis, St. P. & S. S. M. R. Co.*, 34 N. D. 466, 159 N. W. 81; *Cook v. Northern Pac. R. Co.*, 32 N. D. 340, L. R. A. 1916D 345, 155 N. W. 867.

**Oklahoma.** *Haskel v. St. Louis & S. F. R. Co.*, — Okla. —, 162 Pac. 459; *St. Louis & S. F. R. Co. v. Akard*, — Okla. —, 159 Pac. 344; *St. Louis & S. F. R. Co. v. Wynn*, — Okla. —, 153 Pac. 1156; *Chicago, R. I. & P. Ry. Co. v. Wynn*, — Okla. —, 153 Pac. 880; *St. Louis & S. F. R. Co. v. Cox, Peery & Murray*, 40 Okla. 258, 138 Pac. 144; *St. Louis & S. F. R.*



a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation or contract.

Almost every detail of the subject is covered so completely that it appears beyond question that Congress intended to take possession of the subject and supersede all state legislation with reference to it.<sup>27</sup> A state statute, for example, providing that no contract, rule or regulation shall exempt a common carrier from its liability as such which would exist had no contract, rule or regulation been made or entered into, is not applicable to interstate shipments since the enactment of the Carmack amendment.<sup>28</sup> A law of a state invalidating contracts which require the bringing of an action for a carrier's liability in less than the statutory period, is inoperative as to shipments governed by the federal law.<sup>29</sup> A provision in the constitution of a state affecting the duty and liability of a carrier for loss and injury to property, has been superseded as to interstate traffic

*Co. v. Zickafoose*, 39 Okla. 302, 6 N. C. C. A. 717, 135 Pac. 406; *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42; *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089.

**Oregon.** *Stoddard Lumber Co. v. Oregon-Washington R. & Nav. Co.*, 84 Or. 399, 165 Pac. 363.

**South Carolina.** *Van Epps v. Atlantic Coast Line R. Co.*, 105 S. C. 406, 89 S. E. 1035; *Spence v. Southern Ry. Co.*, 101 S. C. 436, 85 S. E. 1058.

**South Dakota.** *House v. Chicago & N. W. R. Co.*, 30 S. D. 321, Ann. Cas. 1915C 1045, 138 N. W. 809.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. Jenkins*, — Tex. Civ. App. —, 196 S. W. 679; *Gulf, C. & S. F. R. Co. v. Nelson*, 108 Tex. 305, 192 S. W. 1056; *Andrews v. Roberts*, — Tex. Civ. App. —, 192 S. W. 569; *Atchison, T. & S. F. Ry.*

*Co. v. Smyth*, — Tex. Civ. App. —, 189 S. W. 70; *Pacific Exp. Co. v. Krower*, 106 Tex. 216, 163 S. W. 9; *Galveston, H. & S. A. Ry. Co. v. Sparks*, — Tex. Civ. App. —, 162 S. W. 943; *Patton v. Texas & P. Ry. Co.*, — Tex. Civ. App. —, 137 S. W. 721.

**Vermont.** *Dionne v. American Exp. Co.*, — Vt. —, 101 Atl. 209.

**Wisconsin.** *Best v. Great Northern R. Co.*, 159 Wis. 429, 150 N. W. 484.

27. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257.

28. *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383.

29. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397.



although the loss occurred within the territory of that state.<sup>30</sup>

The assumption of federal control over interstate shipments by the Carmack amendment invalidates a state statute imposing a penalty of \$50.00 on carriers for failure to pay claims within forty days, in so far as interstate shipments are affected thereby.<sup>31</sup> Section 9 of article 23 of the Oklahoma constitution, which prescribes that any provision of any contract or agreement stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establishing any claim, shall be null and void, has ceased to be applicable to bills of lading or contracts governing interstate traffic.<sup>32</sup> A statutory enactment of a state providing a penalty for the failure of a carrier to trace property and inform the shipper when, where, and by which carrier his property was lost, damaged or destroyed, does not control as to interstate shipments.<sup>33</sup>

In *St. Louis, I. M. & S. R. Co. v. Starbird*,<sup>34</sup> the effect of the Carmack amendment on all state laws and regulations was thus stated: "On June 29, 1906, Congress passed the so-called Hepburn Act (34 Stat. 584), by section 20 of which it undertook to provide for the liability of carriers in interstate commerce, and to subject them, as to interstate shipments, to certain obligations which should supersede the varying requirements of the States through which interstate transportation might be conducted. The construction of this act came before this court in *Adams Express Company v. Croninger*, 226 U. S. 491, and upon full consideration it was held that the effect of the Carmack Amendment was to supersede all legislation in the particular States, and to embrace the liability of the carrier in interstate transporta-

30. *Chicago, St. P., M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155.

31. *Charleston & W. C. R. Co. v. Varnville Furniture Co.*, 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, Ann. Cas. 1916D 333.

32. *St. Louis & S. F. R. Co. v. Bilby*, 35 Okla. 589, 130 Pac. 1089.

33. *Meetze v. Southern Exp. Co.*, 91 S. C. 379, 74 S. E. 823.

34. 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462.

1 Control Carriers 35

tion. It was there said that almost every detail of the subject had been completely covered, and that there could be no rational doubt that Congress intended to take possession of the subject and lay down rules and regulations upon which the parties might rely and have their rights determined by a uniform rule of obligation. Among other things, the act required that the initial carrier should issue a receipt or bill of lading whenever it received property for transportation from a point in one State to a point in another State, and the initial carrier was made liable, not only for the results of its own negligence, but also for loss, damage or injury to the property occasioned by any common carrier, railroad or transportation company to which the property should be delivered and over whose line or lines the property might pass, and it was provided that no contract, receipt, rule or regulation should exempt such initial carrier from the liability imposed by the act. As the shipment in this case was interstate, there can be no question that, since the decision in the Croninger Case, *supra*, the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligation. Since the Carmack Amendment, the carrier in this case is liable only under the terms of that act of Congress, and the action against it to recover on a through bill of lading for the negligence of connecting carriers as well as of itself, was founded on that Amendment. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 196. This principle has been so frequently recognized in the recent decisions of this court that it is only necessary to refer to some of them. In *Southern Railway Co. v. Prescott*, 240 U. S. 632, 636, 639, this court said: 'As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. . . . Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with res-

pect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions.' In *Southern Express Company v. Byers*, 240 U. S. 612, 614, this court said: 'Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common law principles accepted and enforced by the Federal courts.' To the same effect, *Northern Pacific Ry. Co. v. Wall*, 241 U. S. 87, 91, 92; *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190; *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin*, 241 U. S. 319."

**§ 311. Decisions of Federal Courts Control in Construing Carmack Amendment.** In construing and applying the Carmack amendment, as amended, state courts are bound to follow the decisions of the federal courts, since by the enactment of the federal act Congress has taken complete possession of the subject matter of the liability of carriers on account of interstate shipments of goods. The rules of decision, therefore, prevailing in the federal courts with respect to the statute supersedes all the laws and policies of the states as manifested by the decisions of their courts.<sup>35</sup> Where the common law rule of the state differs from that en-

35. **United States.** *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469.

**Kentucky.** *Cleveland, C., C. & St. L. R. Co. v. Young*, 175 Ky. 841, 195 S. W. 93.

**Michigan.** *Harrison Granite Co. v. Grand Trunk R. Co.*, 175 Mich. 144, 141 N. W. 642.

**Mississippi.** *Southern R. Co. v. North State Oil Co.*, 107 Miss. 71, 64 So. 965; *St. Louis & S. F. R. Co. v. Woodruff Mills*, 105 Miss. 214, 62 So. 171.

**Missouri.** *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464; *Joseph v. Chicago, B. & Q. R. Co.*, 175 Mo. App. 18, 157 S. W. 837.

**New York.** *Davenport v. Chesapeake & O. R. Co.*, 87 N. Y. Misc. 303, 149 N. Y. Supp. 865; *United Lead Co. v. Lehigh Valley R. Co.*, 156 N. Y. App. Div. 525, 141 N. Y. Supp. 310.

**North Dakota.** *Cook v. Northern Pac. R. Co.*, 32 N. D. 340, L. R. A. 1916D 345, 155 N. W. 867.

**South Carolina.** *Spence v. Southern R. Co.*, 101 S. C. 436, 85 S. E. 1058; *Elliott v. Atlantic*



forced in the federal courts, the state courts will follow the federal rule as to all interstate shipments.<sup>35a</sup>

**§ 312. State Courts may Enforce Provisions of Carmack Amendment and Award Damages Thereunder.**

Although Section 9 provides that persons damaged by a violation of the Interstate Commerce Act may make complaint before the Commission or any district court of the United States, and although the act known as the Carmack amendment which renders the initial carrier liable for loss or damage to an interstate shipment caused by it, or by a connecting carrier, was passed as an amendment to the Act to Regulate Commerce, damages caused by the failure to deliver goods as required by the Carmack amendment are not within the provisions of sections 8 and 9 of the statute; because the cause of action is the loss of the property intrusted to the common carrier and such loss is in no way traceable to a violation of the provisions of the Act to Regulate Commerce.<sup>36</sup> "The jurisdiction of the state court," said Mr. Justice Lamar in the Wallace case, "was attacked, first, on the ground that sec. 9 of the original act of 1887 provided that persons damaged by a violation of the statute 'might make complaint before the commission . . . or in any District or Circuit Court of the United States.' 24 Stat. 379. It was contended that *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, ruled that this jurisdiction was exclusive, and from that it was argued that no suit could be maintained in a state court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way

*Coast Line R. Co.*, 94 S. C. 129, 75 S. E. 886, 77 S. E. 718.

**South Dakota.** *House v. Chicago & N. W. R. Co.*, 30 S. D. 321, Ann. Cas. 1915C 1045, 138 N. W. 809.

**Wisconsin.** *Chicago, M. & St. P. R. Co. v. Rock County Sugar Co.*, 162 Wis. 374, 156 N. W. 607.

35a. *Toledo & O. C. Ry. Co. v.*

*Kibler*, — Ohio —, 119 N. E. 733.

36. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.)

7.



traceable to a violation of the statute, and is not, therefore, within the provision of secs. 8 and 9 of the act to regulate commerce. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 208. The real question, therefore, presented by this assignment of error, is whether a state court may enforce a right of action arising under an act of Congress. Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb v. Connolly*, 111 U. S. 624, 637. On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of the United States. This presumption would be strengthened as to a statute like this passed, not only for the purpose of giving a right, but of affording a convenient remedy."

**§ 313. Actions Brought in State Courts under Carmack Amendment not Removable, When.** The Judicial Code as originally enacted provided that any suit of a civil nature, at law or in equity, arising under the Consti-

tution or the laws of the United States, of which the district courts of the United States are given jurisdiction, brought in any state court, may be removed by the defendant therein to the district court of the United States for the proper district.<sup>37</sup> Applying this provision, it was held that an action for damages under the Carmack amendment was a suit of a civil nature under the laws of the United States and might, therefore, be removed to the proper federal court without regard to the amount involved.<sup>38</sup> To obviate the result following from these decisions, Congress passed an act which provides that no suit brought in any state court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under the Carmack amendment, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.<sup>39</sup>

**§ 314. Initial Carrier may not be Sued in Domicile of Terminal Carrier.** It is well established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof.<sup>40</sup> In *St. Louis Southwestern R. Co. of Texas v.*

37. Section 28 of Chap. 3 of the Judicial Code, 36 Stat. at L. 1094.

38. *Alabama Great Southern Co. v. American Cotton Oil Co.*, 143 C. C. A. 313, 229 Fed. 11.

39. Act of Jan. 20, 1914, 38 Stat. at L. 278.

40. *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U. S. 496, 56 L. Ed. 857, 32 Sup. Ct. 550; *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 54 L. Ed. 272, 30 Sup. Ct. 125;

*Green v. Chicago, B. & Q. R. Co.*, 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. 595; *Peterson v. Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 51 L. Ed. 841, 27 Sup. Ct. 513; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122, 23 Sup. Ct. 807; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113, 23 Sup. Ct. 728; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517, 15 Sup. Ct. 559; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, 1 Sup. Ct. 354; *Lafayette*

Alexander,<sup>41</sup> it was contended by the holder of the bill of lading that an initial carrier domiciled in Texas which had contracted to transport the goods from a point in Texas to New York through its connecting carriers became, by virtue of the statute, subject to service of process in New York through the connecting carrier as its agent; but the court rejected this theory, and said: "The object of the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of destination, using the lines of connecting carriers as its agencies, thus securing for the benefit of the shipper unity of transportation and responsibility. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. p. 203. The provisions of the amendment had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was not intended, as we view it, to make foreign corporations through connecting carriers liable to suit in a district where they were not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction. We reach the conclusion that this case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

*Ins. Co. v. French*, 18 How. (U. S.)  
404, 15 L. Ed. 451.

41. 227 U. S. 218, 57 L. Ed. 486,  
33 Sup. Ct. 245, Ann. Cas. 1915B 77.



§ 315. **Receipt from Shipper of Money Paid by Initial Carrier Binding upon Connecting Carrier in Absence of Fraud.** The statute provides that the common carrier, railroad or transportation company issuing the receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose lines the loss, damage or injury was sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof. The purpose of the act was to give the initial carrier, after it had been required to pay a loss, a remedy over against the particular carrier causing the loss, for the amount paid by the initial carrier as evidenced by any receipt, etc.<sup>42</sup> If, therefore, there is a loss of or damage to goods under a contract of affreightment made with the initial carrier which it, in good faith, has paid to the owner, the receipt of the shipper showing the payment is sufficient evidence to establish the amount of such claim in an action against the connecting carrier, and, in the absence of fraud, is conclusive thereof.<sup>43</sup> A judgment obtained by a shipper against an initial carrier for loss, injury or damage to his shipment on the line of a connecting carrier operates as a final adjudication of the amount of damages so sustained and in any subsequent litigation between the carriers, the amount of such damages so ascertained in the original judgment will not be open to question except upon a plea and proof of collusion or fraud; but the judgment is not conclusive upon the question as to whether the loss or damage occurred while the goods were in the possession and control of the connecting carrier.<sup>44</sup>

42. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

43. *Kansas City & M. R. Co. v. New York Cent. & H. River R. Co.*, 110 Ark. 612, 163 S. W. 171. But see *Central of Georgia R. Co. v. Sims*, 169 Ala. 295, 53 So. 826, in

which the court remarked that even a judgment obtained by a shipper against the initial carrier is not conclusive against the connecting carrier but merely *prima facie* evidence.

44. *St. Joseph & G. I. Ry. Co. v. Des Moines Union Ry. Co.*, — Iowa —, 162 N. W. 812, wherein



§ 316. **Recovery Against Initial Carrier Bars an Action Against Connecting Carriers.** When a shipper prosecutes an action and recovers judgment against an initial carrier for loss and damage to an interstate shipment and accepts payment thereof, he is then precluded from recovering additional damages for the same cause of action against the connecting carrier; because when a party elects to sue a tortfeasor who is liable for all the damages, and recovers, he cannot thereafter sue the other wrongdoer.<sup>45</sup> It appeared from the facts in the O'Briant case, cited, that the plaintiff shipped live stock from Athens, Tenn., to Glenwood, Mo., the shipment moving over the line of the Louisville & Nashville Railroad from Athens to East St. Louis, Ill., and over the line of the Wabash Railroad from East St. Louis to Glenwood, Mo. He brought an action for the loss and damage complained of against the initial carrier and recovered a judgment, which was paid. Being dissatisfied with the amount of the judgment, he thereafter prosecuted an action against Pryor as the receiver

the court said: "The judgment against the plaintiff entered in the Missouri court is neither in form or effect a judgment against the defendant in this case, nor was it given any such effect by the trial court. The right of the plaintiff in this action to recover depends, not upon the judgment mentioned, but upon the sufficiency of the showing that the loss, injury or damage for which such judgment was entered occurred on the defendant's line of railroad, and so far as that issue is concerned the adjudication between Duncan and the plaintiff is of no force or effect against the defendant. But when the plaintiff had offered evidence tending to show, and as we think conclusively showing, that the injury to the shipment was sustained while in the possession and control of the de-

fendant, then the statute makes the judgment in favor of Duncan competent evidence upon the further question as to the amount of plaintiff's recovery. Such is the very obvious meaning and intent of the statute, and the court is not at liberty to nullify its effect by any strained or unnatural construction of its language. As the statute makes the initial carrier primarily liable to the shipper for the default or negligence of any and all connecting carriers, as well as its own, it is thereby compelled, when sued upon a claim of that nature, to defend, not alone its own conduct in the premises, but the conduct of all the carriers making up the connected line of through transportation."

45. O'Briant v. Pryor, — Mo. App. —, 195 S. W. 759.

of the Wabash Railroad Company and obtained a judgment in the trial court. It was held that he could not recover. "Under the Carmack Amendment," said Judge Ellison, "to the Interstate Commerce Act the initial carrier (the Louisville & Nashville company) was liable for all damages for the through shipment, although all, or a part, of such damages accrued by reason of the negligence of the destination carrier. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257. And such is the decision of the Springfield Court of Appeals. *Jones v. Railroad*, 182 S. W. 1064. The case presented is that plaintiff began an action against a wrongdoer who was liable for the entire wrong committed on his property, prosecuted it to judgment, recovered a smaller sum than he asked, but acquiesced and accepted such sum in satisfaction of the judgment. He then afterwards began an action against a second wrongdoer liable for a part of the damage done to the same property, seeking to recover such part. When he elected to sue the party liable for all the damage, that disabled him from dividing up his action, by accepting a part and suing the other wrongdoer, who committed other parts of the damage. When he accepted satisfaction from the wrongdoer liable for all, he discharged the others. *Chicago Herald Co. v. Bryan*, 195 Mo. 574, 588, 92 S. W. 902. In *Brown v. Cambridge*, 3 Allen (Mass.) 474, it is said: 'The same doctrine applies to all joint torts, and to torts for which the injured party has an election to sue one or more parties severally. Where, for example, a master is liable for the tort of his servant, a satisfaction from one discharges both, though they cannot be sued jointly.' Plaintiff seeks to avoid the effect of his former suit by testifying that he was present 'when the court rendered judgment for me for \$95 for 3 cows and 1 calf, and that the court's finding was based on the fact that they were not delivered, and also that I didn't give notice to the Louisville & Nashville company.' We think such testimony does not affect the law as we have stated it."

## CHAPTER XVI

### THE CARMACK AMENDMENT AS MODIFIED BY FIRST AND SECOND CUMMINS AMENDMENTS.

- Sec. 317. Text of the Carmack Amendment as Modified by First and Second Cummins Amendments.
- Sec. 318. Causes Leading to Enactment of First Cummins Amendment —Agreed Valuation Clauses and Notices of Loss.
- Sec. 319. Effect of Second Cummins Amendment upon Provisions of First Cummins Amendment.
- Sec. 320. Object and Purpose of Congress in Enacting Second Cummins Amendment of 1916.
- Sec. 321. Cummins Amendment has no Retroactive Effect.
- Sec. 322. Initial Carriers Subject to the Statute as Changed by Cummins Amendment.
- Sec. 323. Interurban Electric Railroad Subject to Statute, When.
- Sec. 324. Carriers Liable for Full Actual Loss, Damage or Injury to Ordinary Live Stock.
- Sec. 325. Limitations of Liability Valid as to Property Other Than Live Stock, When.
- Sec. 326. Stipulations as to Notice of Claims and Limitations upon filing of Suits Now Regulated by Statute.
- Sec. 327. Statute not Applicable to Export and Import Shipments to and from Countries not Adjacent to United States.

§ 317. Text of the Carmack Amendment as Modified by First and Second Cummins Amendments. The Carmack amendment as modified by the first<sup>1</sup> and second<sup>2</sup> Cummins amendments thereto, now reads as follows: "That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered

1. Act of March 4, 1915, 38 Stat. at L. 1197.

2. Act of August 9, 1916, 39 Stat. at L. 441.



or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized



or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided further*, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be re-

quired to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

§ 318. **Causes Leading to Enactment of First Cummins Amendment—Agreed Valuation Clauses and Notice of Loss.** In construing the Carmack amendment as originally enacted, the federal Supreme Court in a series of cases, beginning in 1913 with *Adams Exp. Co. v. Croninger*,<sup>3</sup> held that while a common carrier could not exempt itself from liability for its own negligence or that of its servants,<sup>4</sup> it might, however, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed valuation, made for the purpose of obtaining the lower of two or more rates proportioned to the amount of the risk. When, therefore, the bill of lading and the tariffs of a carrier contained two rates based on valuation and goods were shipped at the lower value in order to secure the lower rate, the Supreme Court, in many cases prior to the Cummins amendment, held that the valuation so declared and fixed in the tariffs controlled when the carrier was sued for loss or damage, as the shipper was conclusively presumed to have knowledge of the schedules on file with the Commission.<sup>5</sup>

3. 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257.

4. The court cited the following cases: *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 872; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627; *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107, 18 L. Ed. 170.

5. *American Exp. Co. v. United States Horse Shoe Co.*, 244 U. S. 58, 61 L. Ed. 990, 37 Sup. Ct. 595; *New York Cent. & H. River R. Co. v. Beaham*, 242 U. S. 148, 61

L. Ed. 210, 37 Sup. Ct. 43; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917 A 265; *Louisville & N. R. Co. v. Maxwell*, 237 U. S. 94, 59 L. Ed. 853, 35 Sup. Ct. 494, L. R. A. 1915 E 665; *Pierce Co. v. Wells Fargo & Co.*, 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; *Boston & M. F. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 593; *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380, 8

In enforcing the provisions of the Carmack amendment as originally enacted, the courts also upheld the validity of stipulations in the shipping contracts providing for a written notice of claims for damages to be given the carrier within a designated time.<sup>6</sup> For example, a livestock contract which provided that claims for damages should be presented within five days from the time the stock were removed from the cars, was held to be valid and enforceable as to an interstate shipment.<sup>7</sup> Similarly, provisions in bills of lading requiring that suits for loss or damage be brought within a designated time shorter than the statute of limitation, were upheld.<sup>8</sup>

The purpose of Congress in the enactment of the Cummins amendment was to destroy, in a measure and to the extent indicated in the succeeding paragraphs, the effect of these decisions in limiting and qualifying

N. C. C. A. 53; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. 383; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391.

6. *United States*. *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462; *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541; *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Southern Exp. Co. v. Caldwell*, 21 Wall. (U. S.) 264, 22 L. Ed. 556.

*Arkansas*. *Lusk v. Long*, 127 Ark. 261, 192 S. W. 213; *St. Louis & S. F. R. Co. v. Keller*, 90 Ark. 308, 119 S. W. 254.

*Colorado*. *Atchison, T. & S. F. Ry. Co. v. Miller*, — Colo. —, 163 Pac. 836.

*Georgia*. *Mitchell & Co. v. At-*

*lantic Coast Line R. Co.*, 15 Ga. App. 797, 84 S. E. 227.

*Iowa*. *Erismann v. Chicago, B. & Q. R. Co.*, — Iowa —, 163 N. W. 627.

*Kansas*. *Abell v. Atchison, T. & S. F. R. Co.*, 100 Kan. 238, 164 Pac. 269.

*Missouri*. *Johnson v. Missouri Pac. Ry. Co.*, — Co. App. —, 187 S. W. 282; *Johnson Grain Co. v. Chicago, B. & Q. R. Co.*, 177 Mo. App. 194, 164 S. W. 182; *McElvain v. St. Louis & S. F. R. Co.*, 176 Mo. App. 379, 158 S. W. 464.

*North Dakota*. *Strommer v. Chicago, M. & St. P. R. Co.*, 38 S. D. 368, 161 N. W. 346.

*Oklahoma*. *Chicago, R. I. & P. Ry. Co. v. Parsons*, — Okla. —, 162 Pac. 955.

7. *Erie R. Co. v. Stone*, 244 U. S. 332, 61 L. Ed. 1173, 37 Sup. Ct. 633, Ann. Cas. 1918A 1024.

8. *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; *Sims v. Missouri Pac. R. Co.*, 177 Mo. App. 18, 163 S. W. 275.



the rights of shippers when suing for loss or damage to interstate shipments.

§ 319. **Effect of Second Cummins Amendment upon Provisions of First Cummins Amendment.** The sole change made in the Cummins amendment of March 4, 1915 by the second Cummins amendment of August 9, 1916, was the repeal of the following clause therein: "Provided, however, that if the goods are hidden from view by wrapping, boxing or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as other rate schedules," and the substitution therefor of the following paragraph: "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to Regulate Commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall con-



tain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other uses."

**§ 320. Object and Purpose of Congress in Enacting Second Cummins Amendment of 1916.** The purpose and object of Congress in passing the second Cummins amendment were thus stated by the Senate Committee on Interstate Commerce in its report accompanying the bill: "The proposed legislation is an amendment of the act of March 4, 1915, commonly called the Cummins amendment. That amendment was designed to impose upon carriers liability for full actual loss, damage, or injury, to property transported notwithstanding any limitation of liability or recovery or representation or agreement as to value. The Cummins amendment as reported by this committee contained a proviso making certain exceptions in its application. The proviso reported by the committee was stricken out on the floor of the Senate and another substituted in its stead and in that form became a law.

"The construction put upon the proviso by the Interstate Commerce Commission has resulted in some vexatious requirements insisted upon by carriers and in some injustice. For instance, it has been held by the commission that under the proviso the carrier may compel the shipper to state the value of the goods tendered for shipment and that if the true value is not stated the shipper is liable to criminal prosecution under section 10 of the act to regulate commerce. The committee does not agree with the commission in the interpretation so placed upon the proviso, but there is no way in which to remedy the matter except to make the intent of Congress so clear that it is impossible to misunder-

stand it. Further, the commission has held that baggage carried on passenger trains upon the ticket of a passenger is within the terms of the law. Whether this construction is correct or incorrect, it is palpable that baggage so transported on a passenger fare ought not to be subject to the rule which controls ordinary freight, and in the bill now reported it is excepted in express terms.

“The bill herewith reported has nothing whatever to do with rates on transportation; that is to say, it does not prescribe the compensation which carriers may charge for service. It reenacts the Cummins amendment with the modifications above suggested. Its purpose is to restore the law of full liability as it existed prior to the Carmack amendment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable recovery is had for full value or on the basis of full value. From this general rule there is excepted, first, baggage carried on passenger trains. This is done for obvious reasons. Second, other property except ordinary live stock, with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively a rate dependent upon value, either an agreed or a released value. When the commission has fixed or authorized such a rate the value agreed upon or released and necessarily stated by the shipper is not to be held as a representation of value under section 10 of the interstate commerce act. With respect to ordinary live stock as defined in the bill there can be no rate dependent either upon agreed or released value, and in the event of loss or damage the carrier must respond for the actual value of the property. The carrier will be permitted to make such a rate on ordinary live stock as will compensate for the service, including liability, but the rate can not vary according to the value of each animal that may be loaded into a car. There will remain the right on the part of the carrier to classify different kinds of animals within the definition of ordinary live stock, but when so classified there can be no lawful variance in rates because one carload of such animals may be more valuable

than another. The committee thinks it proper to say that in the preparation of the amendment of S. 3069 it has had the benefit of the advice of a member of the Interstate Commerce Commission and that the recommendation of the commission has been adopted."

**§ 321. Cummins Amendment has no Retroactive Effect.** The Cummins amendment which restricts the right of the carrier to make certain stipulations in a bill of lading, is not retroactive in its effect. It does not, therefore, apply to shipments made and causes of action which accrued before its effective date.<sup>9</sup>

**§ 322. Initial Carriers Subject to the Statute as Changed by Cummins Amendment.** The Carmack amendment as originally enacted provided that the initial carrier subject thereto was a "common carrier, railroad or transportation company receiving property for shipment from a point in one state to a point in another state." It therefore included many common carriers not subject to the general provisions of the Interstate Commerce Act, such as water carriers acting independently of railroads. The statute did not, however, include carriers engaged in foreign commerce as distinguished from interstate commerce.<sup>10</sup> A railroad com-

9. *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462; *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; *Bryan v. Louisville & N. R. Co.*, — N. C. —, 93 S. E. 750; *Washington Horse Exch. v. Louisville & N. R. Co.*, 171 N. C. 65, 87 S. E. 941.

10. *J. H. Hamlen & Sons v. Illinois Cent. R. Co.*, 212 Fed. 324; *Aldrich v. Atlantic Coast Line R. Co.*, 104 S. C. 364, 89 S. E. 315; *Houston East & W. T. R. Co. v. Inman, Akers & Inman*, 63 Tex. Civ. App. 556, 134 S. W. 275.

"This language is clear and unambiguous, and the prohibition

against the right of a connecting carrier to limits its liability to loss or damage occurring on its own line is only applicable when the shipment is from 'a point in one state to a point in another state.' The use of this language excludes the idea that Congress intended to prohibit such contracts when the shipment was to a foreign country. The word 'state,' as used in the Constitution of the United States, has been uniformly construed to mean a constituent member or part of the federal union having an independent local governmental organization, but as used in the statutes and treaties of the United States it has been



pany, for example, transporting property from a point in the United States to a point in Canada, was not, as to such a shipment, subject to the act.<sup>11</sup> A Missouri court held that a carrier engaged in transporting property between two points in the same state but which passed in transit through another state, was within the Carmack amendment<sup>12</sup> while a contrary conclusion was reached by a Texas court.<sup>13</sup>

But as changed by the Cummins amendment, the act now applies to any common carrier, railroad or transportation company *subject to the provisions of the Interstate Commerce Act* receiving property for transportation from a point in one state or territory or the District of Columbia, to a point in another state, terri-

construed to include territories of the United States, and also foreign countries or states when such construction is required by the context of the act or instrument, and is necessary to effectuate its evident purpose. *Hepburn v. Elzey*, 6 U. S. 445, 2 L. Ed. 332; *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; *Tabott v. Silver Bow*, 139 U. S. 438, 11 Sup. Ct. 594, 35 L. Ed. 210; *De Geofrey v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Eidman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. Ed. 697; *Terry v. Olcott*, 4 Conn. 442; *Insurance Co. v. Insurance Commissioners*, 64 Mich. 614, 31 N. W. 542. We think it is clear from an examination of the entire act that the word 'state,' as used in the amendment in question, was used in its limited constitutional sense, and was intended to mean a state of the federal Union. Other portions of the act are expressly made applicable to shipments from 'any state or territory or the District of Columbia to any other state, ter-

ritory or District of Columbia, or to any foreign country,' showing that Congress did not understand or intend that the word 'state,' as used in the amendment, should include a foreign state or country, as well a state of the Union." *Houston, East & W. T. R. Co. v. Inman, Akers & Inman*, *supra*. *Contra: Texas & P. Ry. Co. v. Langbehn*, — Tex. Civ. App. —, 158 S. W. 244.

11. *Best v. Great Northern R. Co.*, 159 Wis. 429, 150 N. W. 484, in which the court said: "The Carmack amendment does not apply to the case, because the shipment here was not from 'a point in one state to a point in another state,' but from a point in one state to a foreign country, and under such circumstances the Carmack amendment does not apply."

12. *Howard v. Chicago, R. I. & P. Ry. Co.*, — Mo. App. —, 184 S. W. 906.

13. *Wichita Falls & W. Ry. Co. v. Asher*, — Tex. Civ. App. —, 171 S. W. 1114.



tory or District of Columbia, or from any point in the United States to a point in an *adjacent* foreign country. Carriers therefore engaged in transporting property from the United States to Mexico or Canada are subject to the statute; but even as amended, the act does not include all carriers subject to the Interstate Commerce Act, for those engaged in transporting property in foreign commerce other than to adjacent foreign countries, are not included. The general principles determining who are carriers within the meaning of the Act to Regulate Commerce are elsewhere discussed and considered.<sup>14</sup>

**§ 323. Interurban Electric Railroad Subject to Statute, When.** An interurban electric railroad engaged in interstate commerce by accepting freight for shipment to a point in another state is within the Carmack amendment although its line only runs between two points in the same state.<sup>15</sup>

**§ 324. Carriers Liable for Full Actual Loss, Damage or Injury to Ordinary Live Stock.** The statute, as changed by the two Cummins amendments, provides that the initial carrier shall be liable for the full actual loss, damage or injury to ordinary live stock caused by it or by any connecting carrier notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt or bill of lading, or any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission. Any such limitation, without respect to the manner or form in which it is sought to be made, is declared by the statute to be unlawful and void. The term "ordinary live stock," as used in the statute, includes all cattle, swine, sheep, goats, horses, and mules,

14. Chapter 6, *supra*.

15. *Ross v. Maine Cent. R. Co.*, 112 Me. 63, 90 Atl. 711, in which the court properly held that the company was a carrier under the statute, but erroneously assumed that the plaintiff was required to

prove that the electric railroad had entered into a common control, management or arrangement for a continuous carriage or shipment into another state. See section 90, *supra*.

except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.

“It is clearly the purpose of the Cummins amendment, as amended, to invalidate all limitations of liability for loss, damage, or injury to ordinary live stock caused by the initial carrier or by another carrier to which shipment may be delivered or which may participate in transporting it, notwithstanding any representation or agreement or release as to value. While it does not appear to be the purpose of petitioners to attempt a limitation of liability, a continuance of the present method of stating rates for ordinary live stock would require a representation of the value, which is declared to be unlawful. The act, as amended, fixes upon the carrier liability for the full actual loss, damage, or injury caused by it to ordinary live stock and invalidates any limitation or attempted limitation of that liability, wherever or in whatever form it is found. Ordinary live stock is excepted from the property as to which we are empowered to authorize or require the establishment of rates dependent upon declared or released value. If rates on ordinary live stock dependent upon declared value could lawfully be maintained without authorization by the Commission, there might and probably would be instances in which conflict would arise as between the liability imposed by the act upon the carrier and the prohibitions of section 10 of the act affecting shippers. We can not, in view of the provisions of the law, authorize or sanction such rates upon ordinary live stock; neither can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission. Under such authority both shipper and carrier are fully protected and the full spirit of the law is observed. The shipper or lawful holder of the receipt or bill of lading for ordinary live stock should be free to press his claim for recovery in full for loss, damage, or injury caused by the carrier, and rates for the transportation of such live stock may not be stated in a manner to require a representation of the value. This is not saying that value may not be

considered and duly weighed as an element in determining what reasonable rates shall be established. As to live stock the order herein will apply only to that which is chiefly valuable for breeding, racing, show purposes, or other special uses. An order will be entered authorizing the maintenance of existing express rates dependent upon the declared or released value of the property transported, except ordinary live stock, also authorizing the form of express receipt to be used."<sup>16</sup>

**§ 325. Limitations of Liability Valid as to Property Other Than Live Stock, When.** Prior to the enactment of the Cummins amendments, a limitation of a carrier's liability for loss or damage even when due to negligence, to a valuation agreed upon for the purpose of determining which of two alternative lawful rates applied to a particular shipment was valid under the Carmack amendment as to all classes of freight, express and baggage.<sup>17</sup> As shown in the foregoing paragraph, no such limitations, since the enactment of the Cummins amendments, are invalid as to ordinary live stock, which includes cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.

But as to all other property shipped in interstate commerce and to adjacent foreign countries, such limitations are still valid even under the Cummins amend-

16. In the Matter of Express Rates, Practices, Accounts, and Revenues, 43 I. C. C. 510.

17. Cleveland, C., C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; George N. Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. 556; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. Ed. 868, 34 Sup. Ct. 526, L. R. A. 1915B 450, Ann. Cas. 1915D 593; Great Northern R. Co. v. O'Connor, 232 U.

S. 508, 58 L. Ed. 703, 34 Sup. Ct. 380, 8 N. C. C. A. 53; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. 383; Barrett v. City of New York, 232 U. S. 14, 58 L. Ed. 483, 34 Sup. Ct. 203; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; Chicago, St. P., M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257.



ments, when *expressly authorized by the Interstate Commerce Commission*. For the statute declares that the provisions of the Cummins amendments making the carriers liable for full actual loss, damage or injury shall not apply to baggage carried on passenger trains or boats, or trains or boats carrying passengers and to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have the effect of limiting liability and recovery to an amount not exceeding the value so declared or released. The statute further requires any tariff schedule which may be filed with the Interstate Commerce Commission pursuant to such order, to contain specific reference thereto, and may also establish rates varying with the value so declared or agreed upon. The Interstate Commerce Commission is empowered to make such order in cases where rates dependent upon a varying with declared or agreed values, would, in its opinion, be just and reasonable under the circumstances and conditions concerning the transportation.

**§ 326. Stipulations as to Notice of Claims and Limitations upon Filing of Suits Now Regulated by Statute.** The Cummins amendments provide that it shall be unlawful for any common carrier to provide by rule, contract, regulation, or otherwise, a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; but if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim or filing of claim, is required as a condition precedent to recovery.



Scores of decisions by federal and state courts construing the original Carmack amendment have, in effect, been overruled by the foregoing amendment. Among these decisions are *Missouri, K. & T. R. Co. v. Harri- man*<sup>18</sup> in which the court, construing the Carmack amend- ment prior to the Cummins amendment, held that a stipulation in a shipping contract providing that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, any statute or limi- tation to the contrary notwithstanding, was valid as to interstate shipments; *St. Louis, I. M. & S. R. Co. v. Starbird*,<sup>19</sup> wherein the court held that a stipulation in a bill of lading providing that claims for damages must be reported by the consignee in writing to the de- livering line within thirty-six hours after the consignee had been notified of the arrival of the freight at the place of delivery, and if such notice was not given, nei- ther the initial nor the connecting carrier was liable, was valid and enforceable; *Chesapeake & O. R. Co. v. Mc- Laughlin*,<sup>20</sup> wherein the court held that a stipulation in a uniform livestock contract declaring that the carrier shall not be liable unless claim for loss or damage shall be made in writing, verified by affidavit and delivered to the general claim agent of the carrier within five days from the time the livestock is removed from the car, was legal and binding upon the shipper; *Northern Pac. R. Co. v. Wall*,<sup>21</sup> wherein the court held that a re- quirement in a livestock contract that a claim for damag- es should be presented within five days from the time the stock was removed from the car, was reasonable. Decisions of similar import which do not now, in view of the foregoing amendment, properly declare the law as to interstate shipments, are cited in the notes.<sup>22</sup>

18. 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397. R. Co. v. Stone, 244 U. S. 332, 61 L. Ed. 1173, 37 Sup. Ct. 633.  
 19. 243 U. S. 592, 61 L. Ed. 917, 37 Sup. Ct. 462. 22. **Kentucky.** *Armstrong v. Ill. inois Cent. R. Co.*, 162 Ky. 539, 172 S. W. 947.  
 20. 242 U. S. 142, 61 L. Ed. 207, 37 Sup. Ct. 40. **Missouri.** *Dunlap v. Chicago & A R. Co.*, 187 Mo. App. 201, 172 S. W. 1178; *Joseph v. Chicago, B. &*  
 21. 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493. See also *Erie*

§ 327. **Statute not Applicable to Export and Import Shipments to and from Countries not Adjacent to United States.** The provisions of the Carmack amendment only applied to shipments of property from a point in one state to a point in another;<sup>23</sup> but as modified and enlarged by the Cummins amendments, its terms include the shipments of property by any common carrier subject to the Interstate Commerce Act from a point in one state or territory or the District of Columbia to a point in another state, territory or District of Columbia, or from any point in the United States to a point in an adjacent foreign country. As the Act as amended makes no reference to shipments from a point in the United States to a point in nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States, its provisions do not, therefore, apply to export and import shipments to and from foreign countries not adjacent to the United States.<sup>24</sup>

Q. R. Co., 175 Mo. App. 18, 157 S. W. 837.

**New Jersey.** Spada v. Pennsylvania R. Co., 86 N. J. L. 187, 92 Atl. 379.

**Oklahoma.** St. Louis & S. F. R. Co. v. Pickens, — Okla. —, 151 Pac. 1055; St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 6 N. C. C. A. 717, 135 Pac. 406.

**Virginia.** Old Dominion S. S. Co. v. C. F. Flanary & Co., 111 Va. 816, 69 S. E. 1107.

23. J. H. Hamlen & Sons v. Illinois Cent. R. Co., 212 Fed. 324; Aldrich v. Atlantic Coast Line R. Co., 104 S. C. 364, 89 S. E. 315; Houston East & W. T. R. Co. v. Inman, Akers & Inman, 63 Tex. Civ. App. 556, 134 S. W. 275; Best

v. Great Northern R. Co., 159 Wis. 429, 150 N. W. 484.

24. In re the Cummins Amendment, 33 I. C. C. 682, in which the Commission said: "Does the amendment to the act apply to export and import shipments to and from foreign countries not adjacent to the United States? This must be answered in the negative in view of the fact that, while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country or from a nonadjacent foreign country."

## CHAPTER XVII

### BASIS, NATURE AND EXTENT OF LIABILITY UNDER CARMACK AMENDMENT AS AMENDED.

- Sec. 328. Liability Imposed by Statute is that of Common Law Doctrines Governing Duties of Carriers.
- Sec. 329. Ancient Common Law and Modern Exceptions to Liabilities of Common Carriers.
- Sec. 330. Interstate Carriers may Contract Against Loss by Fire not Due to Negligence.
- Sec. 330a. Stipulations Exonerating Carrier from its Own Negligence Invalid though Filed with Commission.
- Sec. 331. Proviso Reserving all Remedies under Existing Laws Relates Solely to Remedies under Federal Laws.
- Sec. 332. Duties and Obligations of Initial Carrier Commence with Delivery of Property for Transportation.
- Sec. 333. Effect of Failure or Refusal of Initial Carrier to Issue Bill of Lading.
- Sec. 334. Term "Lawful Holder" of Bill of Lading not Limited to Owner of Property Transported.
- Sec. 335. Bill of Lading Issued by Initial Carrier Governs Entire Transportation—Second Bill Void.
- Sec. 336. Statute Embraces Damages due to delay as well as for Loss or Injury in Course of Transportation.
- Sec. 337. Wrongful Delivery by a Terminal Carrier a "Loss" Within Meaning of Statute.
- Sec. 338. Initial Carriers Liable for Property Held by Terminal Carrier as Warehouseman—Conflicting Decisions.
- Sec. 339. Nature of Carrier's Liability as Warehouseman.
- Sec. 340. Quantum of Proof Necessary to Establish Liability under Federal Statute.
- Sec. 341. Federal Rule as to Negligent Delay Co-operating with Act of God in Destruction of Property.
- Sec. 342. Connecting and Terminal Carriers Liable Under Carmack Amendment as Amended, When.
- Sec. 343. Connecting and Terminal Carriers not Liable for Acts of Initial Carrier.
- Sec. 344. Presumption that Loss or Damage Occurred on Line of Terminal Carrier—Contrary Rulings.
- Sec. 345. Last Carrier not Liable in Absence of Proof of Damage on its Line.
- Sec. 346. Effect of Rerouting or Change of Destination upon Liability of Initial Carrier.
- Sec. 347. Carriers May Limit Liability for Value of Property at Time and Place of Shipment.
- Sec. 348. Provisions of Shipper's Contract with initial Carrier inure to Benefit of Connecting Carrier.

§ 328. **Liability Imposed by Statute is that of Common Law Doctrines Governing Duties of Carriers.** The initial carrier is made liable under the statute as amended to any holder of a bill of lading for any loss, damage or delay to such property caused by it or by any connecting carrier to whom the property may be delivered. The liability thus imposed plainly implies a liability for some default in its common law duty as a common carrier.<sup>1</sup> The Carmack amendment has not changed the

1. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257. "What is the liability imposed upon the carrier?" said the court, "It is a liability to any holder of the bill of lading which the primary carrier is required to issue 'for any loss, damage or injury to such property caused by it,' or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' The liability thus imposed is limited to 'any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common law duty as a common carrier."

"The liability imposed by the statute is the liability imposed by ~~common law~~ upon common carriers." *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 557, 57 L. Ed. 690, 33 Sup. Ct. 397.

"The loss being established, the liability of the initial carrier was not dependent upon the plaintiff's proof that such loss was caused by either the initial or connecting carrier. Defendant's liability was the common-law liability of a carrier, and it was not incumbent upon plaintiff to show that an act of the carrier occasioned the loss." *Chicago & E. I. R. Co. v. Collins Produce Co.*, 149 C. C. A. 169, 235 Fed. 857, 14 N. C. C. A. 917.

"The purpose of this amendment, \* \* \* is to make the primary carrier liable as at common law for a loss of the property occurring upon the line of its agents, the connecting carrier or carriers, the same as if it had occurred upon its own line." *Storm Lake Tub & Tank Factory v. Minneapolis & St. L. Ry. Co.*, 209 Fed. 895.

"In other words, the common law rule of liability was not changed by the act. That rule was not limited to negligence, but went beyond that and made the carrier liable for any loss or damage not the act of God or the public enemy. \* \* \* The purpose of the act was to make the first carrier liable as at common law." *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149.



common law doctrine in respect to a carrier's liability for loss occurring on its own line.<sup>2</sup>

The same liability of the initial carrier upon its own line is imposed upon it as to any loss or damage on the lines of a connecting carrier.<sup>3</sup> "Under the Carmack amendment," said the court in the Wallace case, "as already construed in the Riverside Mills Case, wherever the carrier voluntarily accepts goods for shipment to a point on another line in another State, it is conclusively treated as having made a through contract. It thereby elected to treat the connecting carriers as its agents, for all purposes of transportation and delivery. This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations in different States, but both on the Company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged to prove their case and to disprove the existence of a defense. The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of

"The object of the words that the carrier, 'shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it' was not to make the carrier absolutely responsible for all happenings *though altogether uncontrollable*. The object was rather to prevent that degree of liability. The statute 'plainly implies a liability for

some default in its common law duty as a common carrier.'" *Collins v. Denver & R. G. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178.

2. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319, 60 L. Ed. 1022, 36 Sup. Ct. 555, L. R. A. 1917A 265.

3. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205.

making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed."<sup>4</sup>

**§ 329. Ancient Common Law and Modern Exceptions to Liabilities of Common Carriers.** Under the common law as expounded in the courts of England, a common carrier was liable for all losses to goods while in its possession although not due to negligence on its part except when they arose either from the act of God or the public enemy. These were the sole exceptions.<sup>5</sup> But in the gradual development of the law in relation to carriers, courts, in furtherance of justice, found it necessary to add other exceptions, and so, where the loss was caused by some act of the shipper, the carrier was relieved of liability.<sup>6</sup> Thus, while a common carrier who receives goods for shipment is required to deliver the goods according to its agreement, yet when the owner of the goods accompanies them, the carrier is not liable

4. "A *prima facie* case is made by showing a delivery, in good condition and properly packed, to the carrier and the subsequent delivery after transportation in bad condition." *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149.

5. **United States.** *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. Ed. 909.

**Connecticut.** *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398.

**Missouri.** *Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, 193 Mo. App. 572, 187 S. W. 149; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Davis v. Wabash, St. L. & P. Ry. Co.*, 89 Mo. 340, 1 S. W. 327. **New York.** *Gardiner v. New*

*York Cent. & H. River R. Co.*, 139 N. Y. App. Div. 17, 123 N. Y. Supp. 865; *Holsapple v. Rome, W. & O. R. Co.*, 86 N. Y. 275; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415.

**Oklahoma.** *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okla. 302, 6 N. C. C. A. 717, 135 Pac. 406; *Missouri, K. & T. R. Co. v. Hancock & Goodbar*, 26 Okla. 265, 109 Pac. 223; *Chicago, R. I. & P. R. Co. v. Wehrman*, 25 Okla. 147, 105 Pac. 328.

6. **United States.** *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. (U. S.) 123, 22 L. Ed. 827.

**Florida.** *Seaboard Air Line Ry. Co. v. Mullin*, 70 Fla. 450, 11 N. C. C. 1, L. R. A. 1916D 982, Ann. Cas. 1913A 576, 70 So. 467.

for any injury or loss to the goods that may occur through the act of the owner or through any agency that is under the exclusive control of the owner.<sup>7</sup> Likewise, the courts found it necessary to ingraft other exceptions, and declared that where the loss was occasioned by the act of the public authorities, the carrier should not be held liable.<sup>8</sup> For example, it has been held that seizure of the goods by military force in obedience to military orders is a defense.<sup>9</sup> It is also now well established that where the injuries to or loss of the goods resulted from the inherent defects or essential qualities of the articles of merchandise, the carrier is relieved from liability.<sup>10</sup>

**Indiana.** *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L. R. A. 339, 32 Am. St. Rep. 239, 31 N. E. 781.

**Iowa.** *Grieve v. Illinois Cent. R. Co.*, 104 Iowa 659, 74 N. W. 192; *Hart v. Chicago & N. W. R. Co.*, 69 Iowa 485, 29 N. W. 597.

**Massachusetts.** *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557.

**Michigan.** *Frohlick Glass Co. v. Pennsylvania Co.*, 138 Mich. 116, 110 Am. St. Rep. 310, 4 Ann. Cas. 1140, 101 N. W. 223; *Heller v. Chicago & G. T. Ry. Co.*, 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667.

**Mississippi.** *Johnson v. Alabama & V. Ry. Co.*, 69 Miss. 191 30 Am. St. Rep. 534, 11 So. 104.

**Missouri.** *Nunnelee v. St. Louis, I. M. & S. R. Co.*, 145 Mo. App. 17, 129 S. W. 762.

**New York.** *Harris v. Northern Indiana R. Co.*, 20 N. Y. 232.

**Tennessee.** *American Lead Pencil Co. v. Nashville, C. & St. L. Ry. Co.*, 124 Tenn. 57, 32 L. R. A. (N. S.) 323, 134 S. W. 613.

**Vermont.** *Ross v. Troy & B. R. Co.*, 49 Vt. 364, 24 Am. Rep. 144.

7. *Nunnelee v. St. Louis, I. M. & S. R. Co.*, *supra*.

8. *Simpson v. Dufour*, 126 Ind. 322, 22 Am. St. Rep. 590, 26 N. E. 69; *Kiff v. Old Colony & N. R. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Merriman v. Great Northern Exp. Co.*, 63 Minn. 543, 65 N. W. 1080; *Bliven v. Hudson River R. Co.*, 36 N. Y. 403.

9. *Nashville & C. R. Co. v. J. N. Estes*, 10 Lea (Tenn.) 749, 78 Tenn. 605.

10. **United States.** *Lawrence v. Denbrees*, 1 Black (U. S.) 170, 17 L. Ed. 89.

**Alabama.** *Southern Exp. Co. v. Ashford*, 126 Ala. 591, 28 So. 732.

**Connecticut.** *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 15 L. R. A. 534, 23 Atl. 870.

**Iowa.** *Gilbert Bros. v. Chicago, R. I. & P. R. Co.*, 156 Iowa 440, 136 N. W. 911.

**Maryland.** *Baltimore & O. R. Co. v. Dever*, 112 Md. 296, 26 L. R. A. (N. S.) 712, 21 Ann. Cas. 169, 75 Atl. 352.

**Massachusetts.** *Evans v. Fitchburg R. Co.*, 111 Mass. 142, 15 Am. Rep. 19.

**Missouri.** *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149; *Libby v. St. Louis, I. M. & S. R. Co.*,



§ 330. **Interstate Carriers may Contract Against Loss by Fire not Due to Negligence.** A carrier cannot make a binding agreement stipulating against its own negligence or that of its servants.<sup>11</sup> But it may, by contract, limit its liability for loss or damage not resulting from its negligence or that of its employees. It follows that it can limit its liability by stipulating in the contract of carriage against loss due to destruction or damage to property in its custody as a carrier by fire when not attributable to its negligence.<sup>12</sup> And such

137 Mo. App. 276, 117 S. W. 659.

**Montana.** Wahle v. Great Northern R. Co., 41 Mont. 326, 109 Pac. 713.

**New Hampshire.** Faucher v. Wilson, 68 N. H. 338, 39 L. R. A. 431, 38 Atl. 1002.

**North Carolina.** Currie v. Seaboard Air Line R. Co., 156 N. C. 432, 72 S. E. 493.

11. **United States.** Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 59 L. Ed. 576, 35 Sup. Ct. 351; Kansas City Southern R. Co. v. Carl, 227 U. S. 637, 57 L. Ed. 683, 33 Sup. Ct. 391; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257; Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151.

**Massachusetts.** Bernard v. Adams Exp. Co., 205 Mass. 254 28 L. R. A. (N. S.) 293, 18 Ann. Cas. 351, 91 N. E. 325.

**New York.** Jennings v. Grand Trunk Ry. Co., 52 Hun (N. Y.) 227, 5 N. Y. Supp. 140.

**North Carolina.** Pace Mule Co. v. Seaboard Air Line R. Co., 160 N. C. 215, 76 S. E. 513.

**North Dakota.** Cook v. Northern Pac. R. Co., 32 N. D. 340, L. R. A. 1916D 345, 155 N. W. 867.

**Tennessee.** Drake v. Nashville, C. & St. L. R. Co., 125 Tenn. 627, 148 S. W. 214.

**Vermont.** Piper v. Boston & M. R. R., 90 Vt. 176, 97 Atl. 508.

**West Virginia.** Bosley v. Baltimore & O. R. Co., 54 W. Va. 563, 66 L. R. A. 871, 46 S. E. 613.

12. York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall (U. S.) 107, 18 L. Ed. 170, in which the court said: "The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may limit his services to the carriage of particular kinds of goods, and may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal. He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part; and he cannot, by any mere act of his own, avoid the responsibility



stipulations may be enforced as to interstate shipments within the purview of the Carmack amendment.<sup>13</sup> "We cannot say that there is anything in the above-quoted provisions of the Interstate Commerce Law," said the court in the Patterson case, cited, "that would change or interfere with the operation of the last-stated, well-settled, declared rule of law in this state, or, to state the proposition substantively, as applicable here, be in the way of a carrier's contracting against loss by fire not due to its own negligence as a contravention of the terms of the federal statute. It will be noted that the section of the act (20) relied upon by appellee as prohibiting the carrier from contracting against or limiting its liability in this particular provides that the receiving carrier shall be liable for any loss, damage, or injury to such property 'caused by it' on any connecting carrier, and that such carrier cannot by receipt, rule, or regulation exempt itself or connecting carrier from the liability, hereby, imposed. Plainly the liability imposed which the statute inhibits being limited or contracted against, has reference to the loss or damage caused by the receiving or any connecting carrier, and, it being the loss or damage thus occasioned that the carrier is prohibited from contracting against, there is no reasonable construction that can be given to the language used that would so broaden its meaning as to include any and every loss or damage without regard to its having been caused by the wrong or negligence of the carrier, and make the carrier an insurer having no right to limit or contract against liability where the loss or damage is occasioned without negligence of any kind

which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused. The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and

qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement."

13. *Central of Georgia R. Co. v. Patterson*, 12 Ala. App. 369, 68 So. 513.

1 Control Carriers 37

on its part, as is the appellee's insistence. We do not think there is anything in the wording, or the evident purpose and intent to be gathered from context, of the federal statute under consideration, that would justify the construction of giving to it the effect of changing the established rule of law with respect to a carrier's right to limit or qualify by special contract its common law liability as an insurer as against loss or damage of goods in its custody for carriage, occasioned by acts beyond its control, and not attributable in any way to its own misconduct or negligence or that of its servants. There is nothing at variance with the construction we have placed on section 20 of the Interstate Commerce Act in the holding by the United States Supreme Court in the case of the Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, relied upon by the appellee. The plain object and purpose of the section in question is to require the receiving carrier to issue a bill of lading to destination for the property to be carried, and to make it liable as principal for damage or loss 'caused by it,' i. e., resulting from the negligence of the carrier or its servants, or that of any of the carriers, over whose lines the property passes, and to inhibit it from contracting against that liability. The holding in the Atlantic Coast Line case, *supra*, in effect that such a provision making a principal liable for the agencies it uses in transportation, and providing that this liability cannot be contracted against, is a valid statute not violative of constitutional guarantees. There is nothing in the holding of that case, as we read it, to support the appellee's contention that the act changes the rule of law that a carrier may contract against loss or damage not due to negligence on the part of itself or servants, and it is not, therefore, an authority in point on the proposition presented here."

**No. 330a. Stipulations Exonerating Carrier from its Own Negligence Invalid Though Filed with Commission.** Contracts of shipment in contravention of the settled principles of the common law preventing the

carrier from contracting against liability for loss or damage resulting from his own negligence, are invalid. The fact that such contracts have been filed with the Interstate Commerce Commission does not modify this rule. For example, a stipulation in a live stock contract that in the event of any unusual delay or detention of the live stock caused by the negligence of the carrier, the shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by the shipper in the purchase of food and water while so detained, was void although the agreement was made in consideration of a reduced rate under a uniform live stock contract duly filed with the Interstate Commerce Commission. "This stipulation," said the court,<sup>13a</sup> "contravenes the principle that the carrier may not exonerate itself from losses negligently caused by it, and is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced freight rate. Such stipulations as are here involved are not legal limitations upon the amount of recovery, but are in effect attempts to limit the carrier's liability for negligence by a contract which leaves practically no recovery for damages resulting from such negligence. While this provision was in the bill of lading, the form of which was filed with the railroad company's tariffs with the Interstate Commerce Commission, it gains nothing from that fact. The legal conditions and limitations in the carrier's bill of lading duly filed with the Commission are binding until changed by that body (*Kansas Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683); but not so of conditions and limitations which are, as is this one, illegal, and consequently void."

**§ 331. Proviso Reserving all Remedies under Existing Laws Relates Solely to Remedies under Federal Laws.** A proviso to the Cummins amendment provides that nothing in the section (section 20 of the Act to

13a. *Boston & M. R. Co. v. Piper*. — U. S. —, 62 L. Ed. —, 38 Sup. Ct. 354.



Regulate Commerce) shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law. But this proviso, however, does not refer to or continue in force rights and remedies given under the common law of a state or under state statutes. It refers solely to existing federal laws in effect at the time the cause of action accrued.<sup>14</sup> "But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to. What this court said of section 22 of this act of 1906 in the case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U. S. 426, is applicable to this contention. It was claimed that that section continued in force all rights

14, *United States. Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co.*, 209 Fed. 895.

*Georgia. Southern Ry. Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418.

*Illinois. Pennington v. Grand Trunk Western R. Co.*, 277 Ill. 39, 115 N. E. 170.

*Kentucky. Southern R. Co. v. Avey*, 173 Ky. 598, 191 S. W. 460.

*Missouri. American Silver Mfg. Co. v. Wabash R. Co.*, 174 Mo. App. 184, 156 S. W. 830.

*Wisconsin. Bichlmeir v. Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 508.

"But the Supreme Court of the United States has construed this proviso to mean only such remedy or right of action as existed under the federal laws, statutory or common, at the time of the passage of

the measure, and not such remedy or right of action as the shipper had under the state law." *Southern Ry. Co. v. Avey*, *supra*.

"The federal statute touching this matter and the decisions of the Supreme Court of the United States construing them afford an exclusive rule for the determination of the controversies pertaining to the subject. This is true, too, notwithstanding the provisions of the Carmack Amendment to the effect that the enactment shall not deprive any holder of a bill of lading of any remedy or right of action that he had under the existing law, for this is construed to refer alone to existing federal law." *Stubblefield v. St. Louis & S. F. R. Co.*, 194 Mo. App. 396, 184 S. W. 149.



and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in section 20, that it was 'evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act.' Again, it was said, of the same clause, in the same case, that it could 'not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself.' To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.'<sup>15</sup>

**§ 332. Duties and Obligations of Initial Carrier Commence With Delivery of Property for Transportation.** The duties and obligations of the initial carrier under the federal statute as to property transported in interstate commerce or to adjacent countries commence with the delivery to and the acceptance by the carrier of the property for the purpose of shipment. His liability therefore commences when the shipper surrenders the entire custody of his goods and the carrier receives complete control of them for the purpose of

15. *Adams Exp. Co. v. Cronin*, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257, 226 U. S. 491, 57 L. Ed. 314.

transportation; for the duty and obligation respecting the care and safety of merchandise rests wholly either upon the owner or upon the carrier and the law recognizes no division of such duty or obligation. Until the property has been placed in the hands of the carrier by a delivery and is accepted by him, he cannot be held responsible. After the delivery is complete, the carrier alone is responsible and no duty or obligation rests upon the owner.<sup>16</sup> "If the goods are delivered to and accepted by the carrier for immediate shipment," said Judge Trimble, "the liability of the latter attaches from the moment of such delivery and acceptance, even though the bill of lading is not made out. The liability of the defendant in this case became fixed therefore unless, by reason of the shipment being interstate in its character, a different rule is applied. Nothing is said in the briefs on either side about this feature of the case, however, and we presume that the fact of its being an interstate shipment does not change or affect the situation, otherwise the question would have been raised and such point made. The Carmack Amendment of June 29, 1906 (34 Stat. 584, ch. 104) to the Hepburn Act of February 4, 1887 (34 Stat. 584, ch. 3591) provides that the carrier 'shall issue a receipt or bill of lading' for property received for transportation (*Adams Express Co. v. Croninger*, 226 U. S. 491, l. c. 504), but it nowhere says the liability of such carrier shall not attach until such bill of lading has been issued. At least our attention has not been directed to any decision holding

16. **United States.** *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461.

**Arkansas.** *St. Louis, A. & T. Ry. Co. v. Neel*, 56 Ark. 279, 19 S. W. 963.

**Georgia.** *Dixon v. Central of Georgia Ry. Co.*, 110 Ga. 173, 35 S. E. 369.

**Louisiana.** *Meyer v. Vicksburg, S. & P. R. Co.*, 41 La. Ann. 639, 17

*Am. St. Rep.* 408, 6 So. 218.

**Mississippi.** *Tate v. Yazoo & M. V. R. Co.*, 78 Miss. 842, 84 *Am. St. Rep.* 649, 29 So. 392.

**Missouri.** *Morrison Grain Co. v. Missouri Pac. R. Co.*, 182 Mo. App. 339, 170 S. W. 404; *Milne v. Chicago, R. I. & P. R. Co.*, 155 Mo. App. 465, 135 S. W. 85.

**New Jersey.** *Standard Combed Thread Co. v. Pennsylvania R. Co.*, 88 N. J. L. 257, L. R. A. 1916C 606, 95 *Atl.* 1002.

to that effect. If the carrier chose to accept and begin the transportation of goods without issuing a bill of lading it would be violating the act referred to, but the relation of shipper and carrier would exist none the less. The agent took possession of the car, had it switched to where it would have to go when finally started, being satisfied that the contract would be signed in the morning, and treated it as a car for immediate shipment, and defendant did not intend to return it to the elevator. The question whether it was delivered and accepted for shipment was a jury question (*Milne v. Railroad, supra*; *Reading v. Railroad*, 165 Mo. App. 123; *Gregory v. Wabash Railroad*, 46 Mo. App. 574.) The jury has decided the question and upon evidence sufficient to justify the finding. Cases which show that goods were merely left at the station, not to be transported immediately in the usual course of business, but to first have something done to them (such as cotton to be compressed) or to await the future convenience or desire of the shipper, are not in point. In the class of cases first mentioned there was no delivery to the carrier, and in the second class the goods were not to be shipped but to be held by the carrier as a warehouseman until the owner decided to ship."<sup>17</sup>

**§ 333. Effect of Failure or Refusal of Initial Carrier to Issue Bill of Lading.** While the Cummins amendment requires the initial carrier, receiving property for transportation in interstate and foreign commerce, to issue a bill of lading therefor, its liability under the statute is in no wise affected by the fact that it failed or refused to issue a bill of lading.<sup>18</sup> If a carrier receives goods for shipment in interstate commerce and fails to issue the bill of lading prescribed by the federal law, it is nevertheless liable for the value of the goods

17. *Morrison Grain Co. v. Missouri Pac. R. Co.*, 182 Mo. App. 339, 170 S. W. 404.

18. *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Keithley v. Lusk*, 190 Mo.

App. 458, 177 S. W. 756; *International Watch Co. v. Delaware, L. & W. R. Co.*, 80 N. J. L. 553, 78 Atl. 49; *Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, 152 Wis. 156, 139 N. W. 743.



and damages thereto, to the same extent as if it had issued the bill of lading.<sup>19</sup> A carrier will not be permitted to take advantage of its own negligence in failing to issue a bill of lading. "The last insistence of defendant is that it can be held to the liability of a through carrier only by issuing a bill of lading for a through shipment and this it did not do. It is true that the Federal act requires initial carriers to issue a receipt or bill of lading for all property received for transportation. On account of other provisions of the act this receipt or bill of lading should contain the point of destination, the rate to be charged and other pertinent provisions. But we cannot assent to the proposition that if a railroad company fails to issue such receipt or bill of lading, when it actually accepts and carries the goods, that it is thereby exempt from liability for its negligence in transporting the same."<sup>20</sup>

**§ 334. Term "Lawful Holder" of Bill of Lading not Limited to Owner of Property Transported.** The statute prescribes that the lawful holder of a bill of lading, issued by the initial carrier pursuant to the requirements of the Act, may maintain an action for any loss, damage or injury to the property transported caused either by the initial carrier or any connecting carrier to whom the goods are delivered. The words "lawful holder" do not limit the remedy given by the Act to the owner of the property or some one shown to be duly authorized to act for him.<sup>21</sup> It is not therefore

19. *Bryan v. Louisville & N. R. Co.*, — N. C. —, 93 S. E. 750; *Davis v. Norfolk Southern R. Co.*, 172 N. C. 209, 90 S. E. 123.

20. *Keithley v. Lusk*, 190 Mo. App. 458, 177 S. W. 756.

21. *Pennsylvania R. Co. v. Olivit Bros.*, 243 U. S. 574, 61 L. Ed. 908, 37 Sup. Ct. 468, in which the court said: "Coming to the merits of the question, however, we concur with the court of errors and appeals in its construction of the

*Carmack Amendment*. It provides: "That any common carrier . . . receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the *lawful holder* (italics ours) thereof for any loss, damage, or injury to such property caused by it. . . ." (34 Stat. at L. 595, chap. 3951, Comp. Stat. 1913, sec. 8592.) The crucial words are 'law-



essential for the plaintiff to prove ownership in the property transported either at the time of shipment, at the time of delivery or prior to the commencement of the suit, if he is in fact the lawful holder of the bill of lading.<sup>22</sup>

**§ 335. Bill of Lading Issued by Initial Carrier Governs Entire Transportation—Second Bill Void.** Under the direction of the Carmack amendment as amended, the connecting carriers become the agents of the initial carrier for the purpose of completing the transportation and delivering the property.<sup>23</sup> The bill of lading therefore required to be issued by the initial carrier upon

ful holder.' Defendant contends that they mean 'the owner or someone shown to be duly authorized to act for him in a way that would render any judgment recovered in such an action against the carrier *res adjudicata* in any other action.' And sec. 8 of the Interstate Commerce Act is referred to as fortifying such view. It provides that 'such common carrier shall be liable to the person or persons injured' in consequence of any violations of the act. To accept this view would make sec. 8 contradict the Carmack Amendment (sec. 20), it having only a general purpose, whereas the purpose of the amendment is special and definitely expresses the lawful holder of the bill of lading to be the person to whom the carrier shall be liable 'for any loss, damage, or injury' to property caused by it. *Adams Exp. Co. v. Croninger supra.*

22. *Carr v. Pennsylvania R. Co.*, 88 N. J. L. 235, 96 Atl. 588.

23. *Northern Pac. R. Co. v. Wall*, 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. 493; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S.

481, 56 L. Ed. 516, 32 Sup. Ct. 205; *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7.

"The Carmack Amendment to the Interstate Commerce Act (Sec. 7, c. 3591, 34 Stat. 584, 593), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of destination is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to reimburse the receiving carrier where the latter is made to pay for such injury. Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purpose of completing the transportation and delivering the property." *Northern Pac. R. Co. v. Wall, supra.*

an interstate shipment governs the entire transportation and determines the duties, obligations and liabilities of all the participating carriers to the extent that the terms of the bill of lading are applicable and valid.<sup>24</sup> The liability of any carrier over the route over which the articles are routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under this statute.<sup>25</sup>

As the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, the carrier is bound to transport the property upon the terms named in the original bill of lading and the acceptance by the shipper of a second bill of lading by the connecting carrier is without consideration and void.<sup>26</sup> "The purpose of the Carmack Amendment," said Mr. Justice Brandeis in the Ward case, cited, "has been frequently considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164; *Northern P. R. Co. v. Wall*, 241 U. S. 87, 92, 60 L. ed. 905, 907, 36 Sup. Ct. Rep. 493. And provisions in the bill of lading inconsistent with that liability are void. *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 57 L. ed. 980, 33 Sup. Ct. Rep. 609. While the receiving carrier is thus responsible for the whole carriage, such connecting road may still be sued for dam-

24. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177.

"The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate

shipment governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid." *Georgia, F. & A. R. Co. v. Blish Milling Co.*, *supra*.

25. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, 33 Sup. Ct. 391.

26. *Missouri, K. & T. R. Co. of Texas v. Ward*, 244 U. S. 383, 61 L. Ed. 1213, 37 Sup. Ct. 617.

ages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading. The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second, issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void. The railway companies contend that while the Carmack Amendment makes the receiving carriers pay for all liability incurred by the connecting lines, the question of whether there is any such liability or not must be determined by reference to the separate contracts of each participating carrier, and not to the contract of the initial carrier alone. If, as contended, a shipper must, in order to recover, first file his 'verified claim' with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still rest under the burden of determining which of the several successive carriers was at fault. Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier."

**§ 336. Statute Embraces Damages due to Delay as well as for Loss or Injury in Course of Transportation.** The act prescribes that the initial carrier shall be liable for any "loss, damage or injury" to the property transported. These words in the statute are comprehensive enough to embrace responsibility for all loss resulting

from any failure to discharge a carrier's duty as to any part of the agreed transportation.<sup>27</sup> An initial carrier is therefore liable for delay occurring on the line of a connecting carrier although there may be no physical damage to the property.<sup>28</sup>

In a leading decision the federal Supreme Court held that the statute included liability for loss of market due to a negligent delay on the line of a connecting carrier.<sup>29</sup> The court said: "The amendment of sec. 20 of the Interstate Commerce Act, known as the Carmack Amendment (Act of June 29, 1906, c. 3591, sec. 7, 34 Stat. 584, 595), provides 'that any common carrier . . . receiving property for transportation from a point in one State to a point in another State shall

27. *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541, in which the court said: "It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter taxes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (*Kansas Southern Ry. v. Carl, supra*; *Southern Railroad v. Prescott, supra*); and if the clause must be deemed to cover a case of misdelivery when

the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid."

28. *Mississippi. Southern Pac. R. Co. v. A. J. Lyon & Co.*, 107 Miss. 777, Ann. Cas. 1917D 171, 66 So. 209.

*Oklahoma. Ft. Smith & W. R. Co. v. Awbrey & Semple*, 39 Okla. 270, 134 Pac. 1117.

*Texas. Pecos & N. T. Ry. Co. v. Cox*, — Tex. Civ. App. —, 150 S. W. 265.

*Virginia. Norfolk Truckers' Exchange v. Norfolk Southern R. Co.*, 116 Va. 466, 82 S. E. 92.

*West Virginia. Karr v. Baltimore & O. R. Co.*, 76 W. Va. 526, 86 S. E. 43.

29. *New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland*, 240 U. S. 34, 60 L. Ed. 511, 36 Sup. Ct. 230, L. R. A. 1917A 193.



issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier . . . from the liability hereby imposed.' We need not review at length the considerations which led to the adoption of this amendment. These were stated in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 199-203. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only 'for loss, damage or delay' occurring on its own line. This 'burdensome situation' was 'the matter which Congress undertook to regulate.' And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled 'as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies,' was within the power of Congress. The rule, said the court in defining the purpose of the Carmack Amendment, 'is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.' And, again, we said in *Adams Express Company v. Croninger*, 226 U. S. 491, that this legislation embraces 'the subject of the liability of the carrier under a bill of lading which he must issue.' 'The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.' *Id.*, p. 506. It is now insisted that Congress failed to accomplish this para-

mount object; that while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable despatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words 'any loss, damage, or injury to such property' caused by the initial carrier or by any connecting carrier are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural in view of the general purpose of the statute, to take the words 'to the property' as limiting the word 'damage' as well as the word 'injury' and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility. Further, it is urged, that the amendment provides that the initial carrier may recover from the connecting carrier 'on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property,' and this, it is said, shows that the 'loss, damage, or injury' described is that which may be localized as having occurred on the line of one of the carriers and therefore should be limited to physical loss or injury. But we find no difficulty in this, as the damages required to be paid by the initial carrier are manifestly regarded as resulting from some breach of duty, and the purpose is simply to provide for a recovery against the connecting carrier if the latter, as to its part of the transpor-

tation, is bound to be guilty of that breach. The view we have expressed finds support in the explicit terms of the act of January 20, 1914, c. 11, 39 Stat. 278, which provides 'that no suit brought in any state court of competent jurisdiction against a railroad company . . . to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce . . . shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000.' If the language of sec. 20 can be regarded as ambiguous, this legislative interpretation of it as conferring a right of action for delay, as well as for loss or injury to the property in the course of transportation is entitled to great weight."

§ 337. **Wrongful Delivery by a Terminal Carrier a "Loss" Within Meaning of Statute.** The initial carrier is liable under the statute for a wrongful delivery of the property by the succeeding carrier, since the act covers not only loss or damage in transit but a misdelivery as well.<sup>30</sup> "The duty of an initial carrier with reference to goods transported does not end by merely carrying the goods to their destination safely. Delivery to the person entitled to receive the same, or, if delivery cannot be made, then safe storage subject to the orders of the consignors, is a part of the contract of carriage. The appellant performed neither of these obligations. It neither delivered the goods to the person entitled to receive them, nor did it store them sub-

30. Georgia, F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541; Thomas v. Blair, 185 Mich. 422, 151 N. W. 1041; Sturges v. Detroit, G. H. & M. R. Co., 166 Mich. 231, 131 N. W. 706; Peycke Bros. Commission Co. v. Sandstone Co. Op. Co., 195 Mo. App. 417, 191 S. W. 1088; Kemper Mill Co. v. Mis-

souri Pac. R. Co., 193 Mo. App. 466, 186 S. W. 8.

"The delivery of the car by the terminal carrier, the Burlington, was unauthorized, and this, under the Interstate Commerce Act, rendered the initial carrier, the Great Northern, liable." Peycke Bros. Commission Co. v. Sandstone Co. Op. Co., *supra*.

ject to the order of the consignor. It is therefore liable for the loss, as the initial carrier, under the federal statute.”<sup>31</sup>

§ 338. **Initial Carriers Liable for Property Held by Terminal Carrier as Warehouseman—Conflicting Decisions.** Many state courts in construing the Carmack amendment have held that the initial carrier is only liable for loss, damage or injury to property transported in interstate commerce while it is in the possession of the terminal carrier as such, and that when the terminal carrier holds the property as a warehouseman and damage then results, the initial carrier is not liable under the federal statute.<sup>32</sup> But these cases seem to be in conflict with the controlling decisions of the federal Supreme Court.<sup>33</sup>

Under the Act to Regulate Commerce, the term “transportation” includes all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported. From this and other provisions of the Hepburn Act Congress recognized that the duties of carriers to the public included the performance of a variety of services that, according to the common law, were separable from the carrier’s services as carrier, and in order to prevent overcharges and discriminations from being made under the pretext of

31. *Coovert v. Spokane, P. & S. R. Co.*, 80 Wash. 87, 141 Pac. 324, citing the following cases: *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 Sup. Ct. 164, 31 L. R. A. (N. S.) 7; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. Ed. 1033, 32 Sup. Ct. 648, Ann. Cas. 1914A 501; *Nashville, C. & St. L. R. Co. v. Dreyfuss-Weil Co.*, 150 Ky. 333, 150 S. W. 321, and *Central of Georgia R. Co. v. Sims*, 169 Ala. 295, 53 So. 826.

32. *Adams Seed Co. v. Chicago Great Western R. Co.*, — Iowa —, 165 N. W. 367; *Hogan Milling Co. v. Union Pac. R. Co.*, 91 Kan. 783, 139 Pac. 397; *Model Mill Co. v. Carolina, C. & O. R. Co.*, 136 Tenn. 211, 188 S. W. 936; *Norfolk & W. R. Co. v. Stuart’s Draft Milling Co.*, 109 Va. 184, 63 S. E. 415.

33. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed 453, 36 Sup. Ct. 177.



performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act.

In the Dettlebach case, cited, the federal Supreme Court held that the valuation clause in the bill of lading applied to the terminal carrier's responsibility as warehouseman. In the Prescott case it was held that the liability of the connecting carrier as a warehouseman was governed by the bills of lading issued by the initial carrier. In neither the Dettlebach or Prescott cases, however, was there an attempt to hold the initial carrier liable for the act of the connecting carrier as warehouseman.

**§ 339. Nature of Carrier's Liability as Warehouseman.** When a carrier holds an interstate shipment as a warehouseman, it is liable for loss or damage thereto only in case of negligence. The burden of proving that the loss or damage was due to negligence is upon the plaintiff and the burden does not shift. Since it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, however, without excuse, is regarded as *prima facie* evidence of negligence; but if it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable care, is not sufficient to show negligence and the burden remains upon the plaintiff to prove that the carrier was guilty of negligence.<sup>34</sup> The rule adopted by many state courts that when property is destroyed by fire when held by the carrier as a warehouseman, the burden of showing that there was no negligence, is upon the defendant,<sup>35</sup> is not applicable to

34. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Cau v. Texas & P. R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 24 Sup. Ct. 663; *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 129, 20 L. Ed. 160.

35. *Almand v. Georgia Railroad & Banking Co.*, 95 Ga. 775, 22 S. E. 674; *Standard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 26 S. W. 704; *Brunson & Boatwright v. Atlantic Coast Line R. Co.*, 76 S. C. 9, 9 L. R. A. (N. S.)

interstate shipments; for the obligation of the carrier with respect to the service within the purview of the Carmack amendment is governed by a uniform rule decided in the federal courts in the place of diverse requirements of state legislation and decisions.<sup>36</sup>

§ 340. **Quantum of Proof Necessary to Establish Liability under Federal Statute.** As the connecting carriers under the Carmack amendment are conclusively deemed to be the agents of the initial carrier for all purposes of transportation and delivery, the point of destination is thereby to be considered as though it were on the initial carrier's own line. A shipment, therefore, in interstate commerce from a point on one railroad line to a point on another, is governed by the same rules of pleading, practice and presumption as would have applied if the shipment had been between stations on the initial carrier's own railroad.<sup>37</sup> When the plaintiff, in an action under the Carmack amendment, shows a delivery to the initial carrier of the merchandise in good condition, and a bad or damaged condition when received by the consignee at the destination point from the terminal carrier, he has made a *prima facie* case under the statute against the initial carrier.<sup>38</sup> And,

577, 56 S. E. 538; Fleischman, Morris & Co. v. Southern Ry., 76 S. C. 237, 9 L. R. A. (N. S.) 519 56 S. E. 974.

36. Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, Ann. Cas. 1916D 333; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. 397; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (U. S.) 257.

37. Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205.

38. **United States.** Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 Sup. Ct. 205.

**Arkansas.** St. Louis, I. M. & S. R. Co. v. Home Oil & Manufacturing Co., 122 Ark. 200, S. W. 176; Kansas City Southern R. Co. v. Mixon-McClintock Co., 107 Ark. 48, Ann. Cas. 1914C 1247, 154 N. W. 205.

**Georgia.** Nashville, C. & St. L. Ry. Co. v. C. V. Truitt Co., 17 Ga. App. 236, 86 S. E. 421.

**Indiana.** Chicago, I. & L. R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810.

similarly, when the plaintiff shows that his goods have been delivered to the initial carrier for transportation and that the terminal carrier has failed to deliver them, there is a presumption of negligent default under the law against the initial carrier.<sup>39</sup> If the failure to deliver is due to the act of God, a public enemy, or some cause against which the initial carrier might lawfully contract, the burden is upon it to bring itself within the exception.<sup>40</sup>

**§ 341. Federal Rule as to Negligent Delay Co-operating with Act of God in Destruction of Property.** Many state courts in determining the liability of carriers for loss or damage to goods prior to the enactment of the Carmack amendment adopted the principle that while a carrier was not liable for loss or damage due to the act of God, yet if the property destroyed by an extraordinary flood, for example, would not have

**Iowa.** *Erisman v. Chicago, B. & Q. R. Co.*, — Iowa —, 163 N. W. 627.

**Kentucky.** *Stiles, Gaddie & Stiles v. Louisville & N. R. Co.*, 129 Ky. 175, 18 L. R. A. (N. S.) 86, 129 Am. St. Rep. 429, 110 S. W. 320.

**Maine.** *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. 945.

**Minnesota.** *Lindsley v. Chicago, M. & St. P. Ry. Co.*, 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7.

**Missouri.** *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149; *Collins v. Denver & R. G. R. Co.*, 181 Mo. App. 213, 167 S. W. 1178.

**Tennessee.** *Louisville & N. Ry. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311.

39. *Nashville, C. & St. L. Ry. Co. v. V. C. Truitt Co.*, 17 Ga. App. 236, 86 S. E. 421; *Brinson & Kramer v. Norfolk Southern R. Co.*, 169 N. C. 425, 86 S. E. 371.

40. *United States. Galveston, H. & S. A. R. Co. v. Wallace*, supra;

*Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co.*, 209 Fed. 895.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Cunningham Commission Co.*, 125 Ark. 577, 188 S. W. 1177.

**Illinois.** *Peoria & P. Union R. Co. v. United States Rolling-Stock Co.*, 136 Ill. 643, 29 Am. St. Rep. 348, 27 N. E. 59, rev'g 36 Ill. App. 552.

**Indiana.** *Pittsburgh, C., C. & St. L. R. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

**Michigan.** *Thomas v. Blair*, 185 Mich. 422, 151 N. W. 1041.

**Missouri.** *Cudahy Packing Co. v. Atchison, T. & S. F. R. Co.*, 193 Mo. App. 572, 187 S. W. 149.

**New York.** *Blackstock v. New York & E. R. Co.*, 20 N. Y. 48, 75 Am. Dec. 372; *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474.

**West Virginia.** *Karr v. Baltimore & O. R. Co.*, 76 W. Va. 526, 86 S. E. 43.



been in the path of the flood except for the negligent delay of the carrier, the shipper was entitled to recover.<sup>41</sup> In other words, these courts recognize the rule that if a negligent delay concurred with the act of God in producing the damage, the carrier is liable. But such is not seemingly the rule in the federal courts,<sup>42</sup> and since the enactment of the Carmack amendment the liability of carriers to shippers of interstate freight, baggage and express is governed by common law prin-

41. *Alabama.* *Louisville & N. R. Co. v. Gidley*, 119 Ala. 523, 24 So. 753.

*Illinois.* *Wald v. Pittsburgh, C. & St. L. R. Co.*, 162 Ill. 545, 35 L. R. A. 356, 52 Am. St. Rep. 332, 44 N. E. 888, rev'g 60 Ill. App. 460.

*Iowa.* *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.*, 130 Iowa 123, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45, 106 N. W. 498; *Hewett v. Chicago, B. & Q. Ry. Co.*, 63 Iowa 611, 19 N. W. 790.

*Maryland.* *Baltimore & O. R. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643.

*Michigan.* *Selleck v. Lake Shore & M. S. Ry. Co.*, 93 Mich. 375, 18 L. R. A. 154, 53 N. W. 556.

*Minnesota.* *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.*, 94 Minn. 269, 69 L. R. A. 509, 110 Am. St. Rep. 361, 3 Ann. Cas. 450, 102 N. W. 709.

*Missouri.* *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527; *Wolf v. American Exp. Co.*, 43 Mo. 421, 97 Am. Dec. 406.

*New York.* *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 564, 86 Am. Dec. 415.

*Texas.* *Missouri, K. & T. R. Co. v. McFadden*, 89 Tex. 138, 33 S. W. 853.

*Wisconsin.* *Cook v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 98 Wis.

624, 40 L. R. A. 457, 67 Am. St. Rep. 830, 74 N. W. 561.

42. *New Orleans & N. E. R. Co. v. National Rice Milling Co.*, 234 U. S. 80, 58 L. Ed. 1223, 34 Sup. Ct. 726; *Cau v. Texas & P. R. Co.*, 194 U. S. 427, 48 L. Ed. 1053, 24 Sup. Ct. 663; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154, 11 Sup. Ct. 554; *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 129, 20 L. Ed. 160; *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. Ed. 909; *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 135 Fed. 135; *Thomas v. Lancaster Mills of Clinton, Massachusetts*, 19 C. C. A. 88, 71 Fed. 481; *Seaboard Air Line Ry. Co. v. Mullin*, 70 Fla. 450, 11 N. C. C. A. 1, L. R. A. 1916D 982, Ann. Cas. 1918A 576, 70 So. 467.

"The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers." *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.*, *supra*.



ciples as accepted and enforced in the federal courts.<sup>43</sup>

Under the federal rule, where property in the possession of a carrier is destroyed by an act of God, but would not have been so lost except for the negligent delay of the carrier, the act of God is the proximate cause of the loss and the negligent delay of the carrier is too remote as a contributing cause to entail liability.<sup>44</sup> "The United States Supreme Court and the courts of a number of the states hold that a delay in transportation which places the shipment in the track of an unprecedented flood is a remote and not a proximate cause of an injury to the shipment by the flood, and the carrier is not liable merely because of the delay. Such courts base the exemption of the carrier from liability upon the ground that the delay was too remote and that the proximate cause of the injury, to wit, the destructive act of God, could not have been foreseen and provided against as a probable result of the negligent delay. In this view the carrier is held not liable even though the injury would not have occurred but for the previous delay in transportation which caused the shipment to be in the track of the flood."<sup>45</sup>

But if the carrier independently of its negligent delay were guilty of some act of negligence which operated as an active, efficient and availing cause of the loss or damage, it is liable even under the federal rule;<sup>46</sup> or,

43. *New York Cent. & H. River R. Co. v. Beaham*, 242 U. S. 148, 61 L. Ed. 210, 37 Sup. Ct. 43; *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, L. R. A. 1917A 197; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469.

44. See cases under note 42, *supra*.

45. *Seaboard Air Line Ry. Co. v. Mullin*, 70 Fla. 450, 11 N. C. C. A.

1, L. R. A. 1916D 982, Ann. Cas. 1918A 576, 70 So. 467.

Where it appears that the loss of an interstate shipment was caused by an extraordinary flood, the prior negligent delay of the carrier is a remote and not a concurrent proximate cause under the controlling decisions of the federal courts. *Toledo & O. C. R. Co. v. Kibler*, — Ohio —, 119 N. E. 733.

46. *Thomas v. Lancaster Mills of Clinton, Massachusetts*, 19 C. C. A. 88, 71 Fed. 481.

as stated by the supreme court of Minnesota:<sup>47</sup> "Under the federal rule unless the carrier is chargeable with some negligence other than delay in making the shipment, the destruction of the property by an act of God, not foreseen in time to guard against it absolves the carrier from liability. \* \* \* Consequently it is necessary to determine whether there is evidence tending to prove negligence other than delay without which the property would not have been destroyed by the flood." The burden of proving such other negligence rests upon the plaintiff.<sup>48</sup>

**§ 342. Connecting and Terminal Carriers Liable under Carmack Amendment as Amended, When.** The Court of Appeals of Georgia, in construing the Carmack amendment, held that the remedy therein provided against the initial carrier of interstate shipments was exclusive and that the connecting or terminal carriers were not liable as to interstate shipments even though it be shown that the loss or damage occurred on their lines.<sup>49</sup> But the remedy provided in the statute against the initial carrier is not exclusive, for an action may be prosecuted against the connecting or the terminal carrier when the loss or damage is shown to have occurred on its line.<sup>50</sup> "This amendment," said the supreme court

47. *Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co.*, 135 Minn. 363, 15 N. C. C. A. 745, 160 N. W. 1028.

48. *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176, 19 L. Ed. 909; *Northwestern Consol. Milling Co. v. Chicago, B. & Q. R. Co.*, 135 Minn. 363, 15 N. C. C. A. 745, 160 N. W. 1028.

49. *Southern R. Co. v. Savage*, 18 Ga. App. 489, 89 S. E. 634; *Southern R. Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418; *Pennington v. Grand Trunk Western Ry. Co.*, 199 Ill. App. 479.

50. *United States, Georgia, F. & A. R. Co. v. Blish Milling Co.*,

241 U. S. 190, 60 L. Ed. 948, 36 Sup. Ct. 541.

**Georgia.** *Central of Georgia R. Co. v. Waxelbaum Produce Co.*, 18 Ga. App. 489, 89 S. E. 635.

**Louisiana.** *Coate Bros. v. New Orleans Terminal Co.*, 139 La. 958, 72 So. 678.

**Maryland.** *Baltimore, C. & A. R. Co. v. William Sperber & Co.*, 117 Md. 595, 84 Atl. 72.

**Missouri.** *Collier v. Wabash R. Co.*, — Mo. App. — 190 S. W. 969.

**South Dakota.** *Elliott v. Chicago, M. & St. P. R. Co.*, 35 S. D. 57, 150 N. W. 777.

of Wisconsin,<sup>51</sup> "clearly gives a right of action against the initial carrier. But is such remedy exclusive? The proviso that nothing in this section should deprive the holder of the receipt or bill of lading of any remedy or right of action which he has under existing law was construed in *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, to mean existing federal law and not state law. So the remedy given by the amendment was additional to and concurrent with any other existing federal remedy. The question, therefore, arises whether, under federal law prior to the enactment of the Carmack amendment, a shipper had a right of action against a carrier negligently causing the damage, but who was not the carrier with whom the initial contract of shipment was made. An affirmative answer to this question was given by the Supreme Court of the United States in the case of the *New Jersey Steam Navigation Co. v. Merchants' Bank*,

"The Carmack amendment merely places the shipper in a position where he may be able to recover for injured property and relieve himself, often times, from the task of locating the active tortfeasor. But if the shipper knows which one among a number of carriers caused the injury, he may sue that one alone." *Elliot v. Chicago, M. & St. P. R. Co.*, *supra*.

"It is also contended by the appellant that this suit is based upon the Carmack amendment to the Interstate Commerce Law, and that, under this amendment, the initial carrier, and the initial carrier only, is liable for damages for injuries to shipments of stock. In this case, the testimony shows that the stock were delivered in good condition to the Illinois Central Railroad Company at Louisville; that they were delivered to the consignee at Holly Springs, their destination, by the Illinois

Central Railroad Company, in a damaged condition; and that the damage to this shipment occurred while they were in the hands of the defendant railroad company. This being true, we do not understand the cases cited by counsel as sustaining this proposition to be applicable. There was an injury, a tort, committed by the appellant company to the appellee, for which a cause of action accrued to the appellee; and it was not the intention nor purpose of the Carmack amendment to deprive the consignee of a cause of action which he had by common law against the railroad company in cases of this character. In fact, this act of Congress expressly negatives any such idea." *Illinois Cent. R. Co. v. Mahon Live Stock Co.*, 111 Miss. 496, 71 So. 802.

51. *Bichlmeier v. Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 508.



6 How. 344, 12 L. Ed. 465, and so far as we have been able to discover the rule there announced has remained unchanged. Such are also the uniform holdings of state courts. Section 1, Hutch. Car. (3d Ed.) sec. 236, and cases cited; 4 Ruling Case Law, 947 and cases cited. The reason of the rule that the owner of the goods may proceed directly against the carrier who is the actual wrongdoer, even if he has a remedy against the receiving carrier, is that each carrier is an agent of the owner authorized to contract with the connecting carrier for the safe transportation of the shipment which, when undertaken by such carrier, becomes a contract with the owner for a breach of which he can proceed directly against the carrier in default."

**§ 343. Connecting and Terminal Carriers not Liable for Acts of Initial Carrier.** But the connecting and terminal carriers receiving property transported in interstate commerce are not liable for loss or damage thereto while in possession of the initial carrier in the absence of an agreement to the contrary.<sup>52</sup>

**§ 344. Presumption that Loss or Damage Occurred on Line of Terminal Carrier—Contrary Rulings.** Under the common law as enforced in many of the states, it was held that when the plaintiff showed the good condition of the goods when delivered to the initial carrier, and that the goods were in bad or damaged condition when delivered by the terminal carrier to the consignee, a presumption arose that the damage occurred on the line of the final carrier.<sup>53</sup> Notwithstanding the enactment of the Carmack amendment making the initial carrier liable for loss or damage on the lines of any of the connecting carriers, some courts have held that the

52. *Knapp v. Minneapolis, St. P. & S. S. M. R. Co.*, 34 N. D. 466, 159 N. W. 81.

53. *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Savannah, F. & W. Ry. Co. v. Harris*, 26 Fla. 148, 23 Am. St.

Rep. 551, 7 So. 544; *Carr v. Chicago, R. I. & P. R. Co.*, 173 Iowa 444, 155 N. W. 840; *Morganton Mfg. Co. v. Chio R. & C. Ry. Co.*, 121 N. C. 514, 61 Am. St. Rep. 679, 28 S. E. 474.



federal act does not supersede this rule.<sup>54</sup> These courts take the position that the Carmack amendment did not abrogate the rule of the state that property received in good order by the initial carrier is presumed to have been received in like order by the succeeding carrier, and that final delivery in bad order raises a rebuttable presumption that the injury occurred on the delivering carrier's line.<sup>55</sup>

On the other hand, if Congress, by the enactment of this statute, raised a presumption against the initial carrier, a presumption that the last carrier is to blame resting upon state rule cannot exist side by side with a federal statute declaring that this presumption exists against the initial carrier; for it would seem to be a logical impossibility to have a presumption that if a shipment which started in good condition is delivered in damaged condition, the last carrier damaged it, and, at the same time, have one available in the same case, upon the same evidence, that the initial carrier did that damage. Thus, in the case cited in the notes,<sup>56</sup> it was held that the presumption of damage on the line of the final carrier, which existed prior to the enactment of the Carmack amendment, has been effectually destroyed by the declaration of the statute that the initial carrier of interstate shipments is liable no matter on what line the damage may have occurred.

**§ 345. Last Carrier not Liable in Absence of Proof of Damage on its Line.** The decisions of the courts cited in the foregoing paragraph holding that a recovery may be had against the terminal carrier of freight in interstate commerce, based upon the common law presumption that property starting in good condition remains so until the last moment when it could have been harmed, seems to be also in conflict with the decision of

54. *Erisman v. Chicago, B. & Q. R. Co.*, — Iowa —, 163 N. W. 627. *Chicago, R. I. & P. Ry. Co. v. Harrington*, 44 Okla. 41, 143 Pac. 325.

55. *Duvall v. Louisiana Western R. Co.*, 135 La. 189, 65 So. 104; *56. Carlton Produce Co. v. Velasco, B. & N. Ry. Co.*, — Tex. Civ. App. —, 131 S. W. 1187.

the federal Supreme Court in *Charleston & W. C. Ry. Co. v. Varnville Furniture Co.*<sup>57</sup> In that case an interstate shipment from a point in North Carolina to a town in South Carolina was involved. The shipper sued the terminal carrier and recovered not only the damages for the loss, but also a penalty under a state law of South Carolina. The damage to the furniture was not shown to have occurred on the line of the terminal carrier, but applying the substantive law of the state, the state courts allowed a recovery against the last carrier not only for the damage, but for the penalty as well. The federal Supreme Court held that the penalty could not be recovered for the reason that it had been superseded by the Carmack amendment. The damages allowed and the penalty recovered were separable; but the court seems also to have decided that the damages were not recoverable as well as the penalty, for the reason that the presumption created by the state law was in conflict with the Carmack amendment. "It is true that in the opinion of the Supreme Court," said Mr. Justice Holmes, "the judgment is spoken of as being for damage done to a shipment 'while in defendant's possession in this State,' and it is said that the statute limits the liability to such damage. But in view of the record this can mean no more than that there is a presumption that the carrier that fails on notice to point out some other as responsible is itself in fault. The defendant happened to be the last carrier of the line, and in many States, including South Carolina, a so-called presumption has been established at common law that property starting in good condition remained so until the latest moment when it could have been harmed. But while this seems to have made its first appearance in the guise of a true presumption of fact, it became, if it was not always, a rule of substantive law, a rule of convenience, calling on the last carrier to explain. *Willett v. Southern Ry.*, 66 S. Car. 477, 479. *Moore v. N. Y., New Haven & Hart-*

57. 237 U. S. 597, 59 L. Ed. 1137, 35 Sup. Ct. 715, Ann. Cas. 1916D 333.

ford, R. R., 173 Massachusetts, 335, 337. The rule is stated as a rule of policy in South Carolina, and the statute makes it still more clearly so, since with the limits that we have stated, it applies indifferently to any carrier in the line, if within the State, according to the accident of the plaintiff's demand. The case then, we repeat, is that a carrier in interstate commerce has been held liable for a loss not shown to have happened while the goods were in its possession or within the State, or to have been caused by it, if those facts are now in any way material, on the strength of a rule of substantive law. The claims dealt with in *Atlantic Coast Line Co. v. Mazursky*, 216 U. S. 122, all arose before June 29, 1906, the date of the Carmack Amendment. The South Carolina law has been amended and enlarged in scope since that decision but it is less necessary to scrutinize those changes than to consider the modifications of the United States law. As it now stands that law requires the initial carrier to issue a through bill of lading and makes it liable for all damage anywhere on the route. Sec. 20. By Sec. 1 as amended by the act of June 18, 1910, sec. 7, c. 309, 36 Stat. 539, 546, it is made the duty of carriers to secure the safe transportation and delivery of property subject to the act, upon reasonable terms. As was said in *Missouri, Kans. & Tex. Ry. Co. v. Harris*, 234 U. S. 412, 420, the result of many recent cases, there cited, beginning with *Adams Express Co. v. Croninger*, 226 U. S. 491 and coming down through *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, is that 'the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments and the contracts of carriers with respect thereto, have been superseded.' It is true that in that case the inclusion of the attorney's fee not exceeding \$20 in the costs upon judgments for certain small claims was upheld although incidentally including some claims arising out of interstate commerce. But apart from the effect being only incidental the ground relied upon was that the statute did not 'in anywise enlarge . . . the responsibility of the carrier' for loss or 'at all affect the ground of recovery, or the



measure of recovery,' pp. 420, 422. The South Carolina Act, on the other hand extends the liability to losses on other roads in other jurisdictions and increases it by a fine difficult to escape. It overlaps the extent of liability for loss."

**§ 346. Effect of Re-routing or Change of Destination upon Liability of Initial Carrier.** An initial carrier is not liable for loss or damage to goods on lines not its own, and over which they were routed without notice to it; because the obligation of the initial carrier ceases when the goods reach the destination, in good condition, to which they were originally intended or consigned.<sup>58</sup> This principle is well illustrated in a case where a carload of shingles was delivered to the Great Northern R. Co. for shipment from Sisco, Wash., to Kankakee, Ill. The carrier issued a bill of lading and routed the shipment over its own line of railway, and over the lines of the Chicago, B. & Q. R. Co. and other carriers whose lines together formed a continuous line of railway from Sisco to Kankakee. The shipper, without notice to the initial carrier, instructed the final connect-

58. *Barrett v. Northern Pac. R. Co.*, 29 Idaho 139, 157 Pac. 1016, in which the court said: "While it is true that in this case the goods were first delivered by respondents to the Chicago, Burlington & Quincy Railroad Company for transportation, and, under the terms of the contract then entered into, that company was the initial carrier and was liable for any damage which might result due to its negligence or to the negligence of the appellant company while the goods were enroute from Connelville to Spokane, it is also true that the contract in question was fully performed and complied with when the goods reached Spokane, and the Chicago, Burlington & Quincy Railroad Company was dis-

charged from all obligations thereunder, unless it be shown, which it was not, that they were damaged en route between the above mentioned points due to negligence in transportation, in which case the initial carrier would be liable under the Carmack amendment. The agreement between appellant (connecting carrier) and respondents, prior to the arrival of the goods in Spokane whereby they were to be transferred from that city to Rupert, constituted a new contract, entirely separate and independent of that entered into with the Chicago, Burlington & Quincy Railroad Company, and one to which that company was not a party."



ing carrier named in the bill of lading, and over whose lines the shipment arrived at Kankakee, to divert the shipment to a point in New Jersey. The terminal carrier, upon receiving such instructions, issued a new bill of lading and forwarded the shipment over a new line of connecting railways to its new destination. Under these facts the court properly held that the initial carrier was not liable for damages to the shingles incurred while they were being transported from Kankakee to the new point of destination.<sup>59</sup> "Under its bill of lading," said the court, "respondent contracted to safely carry and deliver the shingles at Kankakee, Ill. Respondent assumed no other nor further obligation. There is no evidence in the case of, nor does appellants attempt to show, the arrival of the shingles at Kankakee in a damaged condition. Its whole theory of recovery is that the respondent is the initial carrier, and hence liable for any damage to the shipment *en route* to its destination. If it could be so held, respondent's liability is coextensive with its undertaking, and that ended with the arrival of the shingles at the destination named in its bill of lading—Kankakee, Ill. Allen & Gilbert Ramaker Co. v. Canadian Pac. R. Co., 42 Wash. 64, 84 Pac. 620, 7 Ann. Cas. 468. The liability of respondent as initial carrier could not be extended to include the shipment from Kankakee to Palisades Park, so as to render it answerable to appellant for any damage to the shingles from this reshipment." On the other hand, the court of appeals of Georgia held that the initial carrier of a shipment from Moorefield, W. Va., to Richmond, Va., which, upon its arrival at Richmond, was reconsigned to Atlanta, Ga., was liable for damage to the shipment while being transported between Richmond and Atlanta. It appeared, however, in this case that the shipment was made under one contract from Moorefield to Atlanta.<sup>60</sup>

59. Parker-Bell Lumber Co. v. Great Northern R. Co., 69 Wash 123, 41 L. R. A. (N. S.) 1064, 124 Pac. 389.

60. Baltimore & O. R. Co. v. Montgomery & Co., 19 Ga. App. 29, 90 S. E. 740, in which Broyles, J., said: "The destination was

**§ 347. Carriers May Limit Liability for Value of Property at Time and Place of Shipment.** Bills of lading issued by carriers for the transportation of property from one state to another frequently contain clauses that the damages for loss or injury shall be determined according to the value of the property at the time and place of shipment. Although the statute provides, since the passage of the Cummins amendment that no contract, receipt, rule or other limitation of any character whatsoever shall exempt the carrier from the liability imposed by the act, such stipulations do not constitute a limitation of liability in violation of the Cummins amendment, but establish a certain and definite means for determining the measure of recovery of a shipment that has been lost or injured. "May the carriers," said the Commission,<sup>61</sup> "lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment? It is argued that such a provision would be neither a limitation of the amount of recovery nor a representation or agreement as to value within the meaning of the new law. It is argued that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations. The Cummins amendment

changed from Richmond to Atlanta by the consignees. The shipment was carried from the point of origin—Moorefield, W. Va.,—to Atlanta, Ga., under one contract, the bill of lading issued by the defendant company, and the shipment moved under a through rate of freight from the point of origin to Atlanta, the final destination, as appears from the freight bill. If the defendant, or its connection, had delivered the shipment at Richmond, demanded a surrender of its bill of lading, there collected

the freight charges due it, and thereafter a new bill of lading had been issued for the shipment from Richmond, Va., to Atlanta, then there would have been a new shipment, and the railroad issuing this second bill of lading at Richmond would have been the initial carrier of the shipment from Richmond to Atlanta."

61. In re the Cummins Amendment, 33 I. C. C. 682. See also Wallingford v. Atchison, T. & S. F. Ry. Co., — Kan. —, 167 Pac. 1136.

clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment." Such stipulations in bills of lading were frequently held to be valid under the Carmack amendment and prior to the enactment of the Cummins amendments.<sup>62</sup>

**§ 348. Provisions of Shipper's Contract with Initial Carriers Inure to Benefit of Connecting Carrier.** The liability of any carrier of interstate freight in the route over which the merchandise is routed, for loss

62. *Gulf, C. & S. F. R. Co. v. Texas Packing Co.*, 244 U. S. 31, 61 L. Ed. 970, 37 Sup. Ct. 487, *Pennsylvania R. Co. v. Olivit Bros.*, 243 U. S. 574, 61 L. Ed. 908, 37 Sup. Ct. 468; *Brockman v. Missouri Pac. R. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Spada v. Pennsylvania R. Co.*, 86 N. J. L. 187, 92 Atl. 379; *Wegener v. Chicago & N. W. R. Co.*, 162 Wis. 322, 156 N. W. 201.

"Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property

in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 616, 37 L. Ed. 292, 304, 13 Sup. Ct. 444. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages." *Gulf, C. & S. F. R. Co. v. Texas Packing Co.*, *supra*.



or damage is that imposed by the Carmack amendment as amended and as measured by the original contract of shipment so far as it is valid under the statute;<sup>63</sup> for when an interstate carrier accepts a shipment to a destination over the lines of connecting carriers, the contract made by it governs the entire transportation and a second contract exacted from the shipper by a connecting carrier is void.<sup>64</sup> It follows, therefore, that any provision in the contract which would be valid in behalf of the initial carrier likewise inures to the benefit of the connecting carriers.<sup>65</sup> For example, a provision in a bill of lading providing for an agreed valuation of the property in the case of loss or accident in consideration of a reduced rate inures to the benefit of a terminal carrier when the property is destroyed while in its custody as a warehouseman.<sup>66</sup> The Carmack amendment as applied to connecting or terminal carriers gives them the benefit of all lawful conditions or provisions in the contract made by the shipper with the initial carrier.<sup>67</sup>

63. *Chicago, St. P., M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. Ed. 328, 33 Sup. Ct. 155; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. Ed. 323, 33 Sup. Ct. 155; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257.

64. *Missouri, K. & T. R. Co. of Texas v. Ward*, 244 U. S. 383, 61 L. Ed. 1213, 37 Sup. Ct. 617.

65. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. Ed.

683, 33 Sup. Ct. 391; *Burke v. Union Pac. R. Co.*, — N. Y. App. Div. —, 166 N. Y. Supp. 100; *Piper v. Boston & M. R. R.*, 90 Vt. 176, 97 Atl. 508.

66. *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177.

67. *Erisman v. Chicago, B. & Q. R. Co.*, — Iowa —, 163 N. W. 627.



## CHAPTER XVIII

### THE FEDERAL BILL OF LADING LAW.

Sec. 349. Origin and General Scope of the Federal Bill of Lading Law

Sec. 350. Constitutionality and Validity of the Act.

Sec. 351. Leading Provisions of Act—Rule in *Friedlander v. Texas & Pacific R. Co.*, Modified.

§ 349. **Origin and General Scope of the Federal Bill of Lading Law.** The Act of Congress commonly known as the Federal Bill of Lading Law was approved on August 29th, 1916, and became effective on and after January 1st, 1917.<sup>1</sup> It was the result of the labor of the Commissioners on uniform state laws of the American Bar Association, after repeated conferences with representatives of the American Bankers Association, the railroad associations and the shippers' association. It was originally prepared for the purpose of having it presented to the several State legislatures with a view of providing uniform legislation upon the subject. It became the law in several of the leading commercial States—Connecticut, Illinois, Iowa, Louisiana, Massachusetts, Maryland, Michigan, New York, Ohio and Pennsylvania. The federal act does not vary substantially from the acts passed by the legislatures of the States just named, save that it is made to apply to interstate and foreign commerce.

The general scope of the Act is defined in section 1 thereof which provides that bills of lading issued by any common carrier for the transportation of goods in any territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by the act. In substance, the act constitutes a codification of the law

1. For full copy of Act see appendix C, *infra*.

and principles controlling interstate and foreign shipments. It defines the rights and liabilities of the common carriers, consignors, consignees, and all other immediate owners or holders of bills of lading.

**§ 350. Constitutionality and Validity of the Act.**

Since Congress has full and plenary power over interstate and foreign commerce, it is manifest that most of the provisions of the Federal Bill of Lading Act constitute a proper exercise of the power of Congress under the commerce clause.<sup>2</sup> But in the discussion of the bill while pending in Congress some doubt was expressed as to the constitutionality of those provisions of the act relating to the transfer or negotiation of bills of lading.<sup>3</sup>

2. See Section 5 and 14, *supra*.

3. The following colloquy between Professor Williston and Senator Pomerene during a congressional hearing in 1912 involving the same bill, suggests the constitutional question raised by some of the provisions of the bill:

"Senator Pomerene. Professor, in referring to the bill which bears my name—and I confess to be the only stepfather to that bill, although I am in hearty approval of it—you said you had some question as to the constitutionality of certain provisions. What provisions did you have in mind?

Mr. Williston. Part 3, and one section of the criminal provision.

Senator Pomerene. That is section 3?

Mr. Williston. No; Part 3. I beg your pardon. The bill in the State was divided into four parts; It is not so divided as it stands before you.

Senator Pomerene. I have here a copy of the bill.

Mr. Williston. Yes; but that does not state the parts as it did in the other bill.

Section 28 to 43, inclusive, relate to dealings in bills of lading between third parties, neither of whom is the carrier. That is, to the negotiation and transfer—

Senator Pomerene. To the negotiation simply of the bills of lading?

Mr. Williston. Yes, sir. And it is that part which troubles me.

Senator Pomerene. Now, state briefly, if you can, what difficulties you see in connection with that matter?

Mr. Williston. The clear ground of supporting Senate bill 957 is that the railroad is an instrument of interstate commerce, and Congress has a right to say what bills of lading a railroad shall issue, and what shall be its liabilities on that instrument. Now suppose that instrument goes into the hands of A, a third person, and A pledges it to a bank in Ohio: Query: Does the fact that that bill was originally issued by a railroad, an instrument of interstate commerce, give Congress the right to say what is the effect of the pledge by A, an outside holder of

The constitutionality of these provisions was thus discussed by the Senate Committee on interstate commerce in its report accompanying the Bill: "The Constitution vests Congress with power 'to regulate commerce with foreign nations and among the several States and with the Indian tribes.' This authority is very broad, very comprehensive. It covers all phases and features of interstate commerce. It touches not only the property of the railroad, but all of its instrumentalities. It controls and protects its operation and its business. The shipment of goods from one State to another is surely interstate commerce. If so, when it comes to the physical property itself, can there be any doubt that the same power extends to all of the instrumentalities used in the conveyance of the property, or to any contract which may pertain to it for the safeguarding of the parties interested? If the goods which are shipped from one State to another be interstate commerce, are we going far afield when we say that the bill of lading, which is the symbolic representative of the goods, is also interstate commerce? The Committee will not take the time to discuss all of the decisions of our Supreme Court

the bill, to B, a bank in Ohio? That is my difficulty.

Senator Pomerene. It is still a contract pertaining to interstate commerce?

Mr. Williston. Yes, sir.

Senator Pomerene. This is simply an offhand suggestion: Would not the holder take it subject to any of its provisions and its liabilities, whatever they may be?

Mr. Williston. The holder would take the rights given by the bill against the railroad, and I think it clear that Congress would have the right to say what these rights shall be against the railroad. But can Congress say what are the relative rights of A and B as against one another?

Senator Pomerene. As between A and B?

Mr. Williston. As between themselves. That is the matter dealt with in these sections that I have alluded to—the rights of A and B as between one another?

Senator Pomerene. Your position is that in that respect then the transferee of the bill of lading will be essentially different from that of the original consignor?

Mr. Williston. A bill of lading is both a contract and a symbol of title to the goods. In so far as it is a contract, it is a contract of the railroad company, and B gets the contract rights which the consignor bargains for against the railroad company. But as to the property rights which B gets from A, that depends upon what A owns, in a large measure."

bearing upon this subject. We shall only refer to a few of them: In 1911 the Supreme Court had before it the case of the Southern Railway Co. v. the United States. The statute involved was what is commonly known as the 'Safety Appliance Act' of March 2nd, 1893, as amended March 2nd, 1903. Its regulatory features applied to all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, and were not confined exclusively to vehicles engaged in such commerce. In the syllabus of the case, 222 U. S. 20, the court says: The power of Congress under the commerce clause of the Constitution is plenary and competent to protect persons and property moving in interstate commerce from all danger, no matter what the source may be; to that end, Congress may require all vehicles moving on highways of interstate commerce to be so equipped as to avoid danger to persons and property moving in interstate commerce. It is of common knowledge that interstate and intrastate commerce are commingled in transportation over highways of interstate commerce, that trains and cars on the same railways, whether engaged in one form of traffic or the other, are interdependent and that absence of safety appliances from any part of a train is a menace not only to that train but to others. Mr. Justice Van Devanter, in delivering the opinion of the court, on page 26, says: We come then to the question whether these Acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another; which is, Is there a real or substantial relation or connection between what is required by these Acts in respect of vehicles used in moving intrastate traffic and the object which the Acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way. Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety



of interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these Acts to vehicles used in moving the traffic which is intrastate as well as to those in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce. In the same report, on page 370, Mr. Chief Justice White handed down the opinion of the Supreme Court in *Northern Pacific Ry. v. State of Washington*. The case involved the validity of the Act of Congress known as the 'hours of service law,' passed March 4th, 1907. In the syllabus the court says: A train moving and carrying freight between two points in the same State, but which is hauling freight between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto. On page 377 the court quotes approvingly the language of the Supreme Court of the State of Washington, as follows: The power of Congress to regulate interstate commerce is plenary, and that, as an incident to this power, the Congress may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours an employee of a carrier so engaged shall be required to remain on duty; and that when it does legislate upon a subject its act supersedes any and all State legislation on that particular subject. The court cites in support of this doctrine a number of its former decisions. In fact, this proposition is not regarded by the courts as

debatable. In *Illinois Central R. R. Co. v. Behrens*, administrator (233 U. S., p. 473), the court says: 'When a railroad is a highway of both interstate and intrastate commerce, and the two classes of traffic are interdependent in point of both movement and safety, Congress may, under the power committed to it by the commerce clause of the Constitution, regulate the liability of the carrier for injuries suffered by an employee engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time isolatedly considered, is interstate or intrastate commerce.' In *St. Louis, Iron Mountain & Southern Railway Company v. Edwards* (227 U. S., 265), the Supreme Court held that—'As applied to interstate shipments, the State cannot oppose penalties for delay in delivery to consignee, as Congress has acted on that subject by the passage of the Hepburn Act.' In *Adams Express Co. v. Croninger* (226 U. S., 491) Mr. Justice Lurton at page 500, says: 'That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury, or damage to such property needs neither argument or citation of authority. That the legislation (of Congress) supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist.' In *Houston & Texas Ry. v. United States* (234 U. S., 343), the lan-

guage of the syllabus, in part, is: 'The object of the commerce clause was to prevent interstate trade from being destroyed or impeded by the rivalries of local governments; and it is the essence of the complete and paramount power confided to Congress to regulate interstate commerce that wherever it exists it dominates. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the State that is entitled to prescribe the final and dominate rule; otherwise the Nation would not be supreme within the national field. While Congress does not possess authority to regulate the internal commerce of a State, as such, it does possess power to foster and protect interstate commerce, although in taking necessary measures so to do it may be necessary to control intrastate transactions of interstate carriers. The use of the State of an instrument of interstate commerce in a discriminatory manner so as to inflict injury on any part of that commerce is a ground for Federal intervention, nor can a State authorize a carrier to do that which Congress may forbid and has forbidden.' Again in *Chicago, R. I. & Pac. Ry. v. Hardwick Elevator Co.* (226 U. S., 427), it was held that—'There can be no divided authority over interstate commerce, and regulations of Congress on that subject are supreme. As to those subjects upon which the States may act in the absence of legislation by Congress, the power of the State ceases the moment Congress exerts its paramount authority thereover.' Now let us apply the doctrine of these cases to the Bill under consideration. They show conclusively that if Congress passes this Bill, it will supersede all State legislation upon the subject. It is urged by those who oppose this bill that if goods be sent from New York to Cleveland and the bill of lading is indorsed and transferred by one citizen of Cleveland to another citizen of Cleveland, within the State of Ohio, it is an intrastate transaction and cannot be controlled by Congress. As applied to an ordinary contract, if there be no other facts involved, this position would be correct. But we answer, the lines of shipment are inter-



state lines; the trains carrying the goods from one State to another are 'instrumentalities' employed in interstate commerce, the shipment of the goods from one State to another is interstate commerce, and in order to define the rights and liabilities of the carrier, the consignor, consignee, and immediate owners, both law and public policy require that the company shall issue bills of lading. Can it be said that the bill of lading, which is the representative of this interstate business, defining the rights and liabilities of all concerned, is not a contract relating to interstate commerce, and therefore not controlled by its principles? Those who object to the bill admit that interstate shipments are subject to Federal control, save only where it relates to a transfer of the bill of lading within a State between citizens of that State. If Congress assumes control of this legislation affecting interstate commerce, must it continue to divide its authority with the State when it comes to the mere negotiation and transfer of a bill of lading between two citizens of the same State within the State, but under all other circumstances the State shall have no control? If such be the case, what becomes of the doctrine that the power of Congress is plenary after it has once assumed to legislate upon a given subject? If so, would the Federal law supersede State legislation? If Congress has the power to compel safety appliances to be placed on cars used both in interstate and intrastate transportation over interstate highways in order to insure the safety of interstate traffic, as was held in *Southern Railway v. United States*, above cited; if it has power to describe the number of consecutive hours of a crew moving a train from one point to another in the State of Washington, hauling merchandise from points in the State to points without the State, as well as in carrying merchandise through the State from a point without the State to a foreign destination, in view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, as was held in *Northwestern Pacific Railway v. State of Washington*, above cited; if Congress has the power to regulate the carrier's lia-



bility for injuries to an employee occurring upon a highway of both interstate and intrastate commerce where the two kinds of traffic are interdependent in point of movement and safety and where the injuries were suffered while the employee was engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time isolatedly considered is interstate or intrastate commerce, as was held in *Illinois Central Railroad Co. v. Behrens*, administrator, above cited; if the State cannot impose penalties for delay and delivery to a consignee because Congress has acted upon that subject by the passage of the Hepburn Act, as was held in *St. Louis, etc., Railway v. Edwards*, above cited; and if when Congress acts in such a way as to manifest its purpose to exercise its conceded authority, the regulatory power of the State ceases to exist, as was held in *Adams Express Co. v. Croninger*, above cited, are we going far afield when we conclude that if Congress decides to regulate a bill of lading from the time it is issued until it is spent it supersedes the authority of the State to control such bill in its transfer from one citizen of a State to another citizen within that State? Paraphrasing the language of Mr. Justice Van Devanter, may not this power of Federal control be exerted to secure the safety of the property transported therein, no matter what may be the source of the danger which threatens, whether it be by transfer or negotiation between two parties residing in different States, or in the same State? Can we not say, again borrowing the thought of the learned Justice, that it is no objection that the dangers intended to be avoided arise in whole or in part out of matters connected with intrastate commerce? Would it not be hypercritical to say that the bill of lading thus relating to interstate shipments is valid and binding on all parties concerned from the day it is issued to the day it is spent, and subject to the control of Congress at all times, save only when it is transferred or negotiated by or between two citizens of the State within the same State? Is it bound to say the Federal law can regulate its issuance and operation before it is thus transferred or

negotiated between two citizens of the same State, and resume its jurisdiction immediately after it is thus transferred or negotiated between them, provided the subsequent transfers or negotiations shall be between citizens of different States? Must Congress, after it has assumed jurisdiction, surrender it for a moment of time to the State authorities only to resume it again after a certain contingency? If so, what becomes of the doctrine of our Supreme Court that when Congress does legislate upon a subject its act supersedes any and all State legislation on that particular subject? A careful study of these decisions of our Supreme Court force the conclusion that the constitutional objections raised are not sound."

§ 351. **Leading Provisions of Act—Rule in *Friedlander v. Texas & Pacific R. Co.* Modified.** A summary of the leading provisions of the Federal Bill of Lading Law with its effect upon some prior decisions of the federal Supreme Court was contained in the report of the Senate Committee on interstate commerce when the bill was introduced. "In the hearings before the Interstate Commerce Commission it was testified," said the Committee in its report, "by well-informed witnesses that bills of lading were annually issued in American commerce representing consignments of merchandise valued at \$25,000,000,000; that 99 per cent of the tonnage and value of the commodities shipped and covered by these bills of lading involved interstate and foreign commerce and only 1 per cent intrastate commerce. On these bills of lading it is estimated that \$5,000,000,000 in cash was advanced annually by the banks. It must follow, therefore, that any reasonable legislation which will lead to the security of these bills of lading in the hands of their owners or holders must be of immense value to the commerce of the country. It affects the business of 100,000,000 of people, extending into 48 States of the Union and to all the nations of the world. In 1889, the United States Supreme Court in *Friedlander v. Texas & Pacific Railroad* (130 U. S., 416) held; 'A bill of lading fraudulently issued by the station agent

of a railroad company, without receiving the goods named in it for transportation but in other respects according to the customary course of business, imposes no liability upon the company to an innocent holder who receives it without knowledge or notice of the fraud and for a valuable consideration.' Under the agreed statement of facts in the case just cited, it appears that the bill of lading issued November 6th, 1883, was executed by one Easton, the agent of the railroad company, fraudulently and in collusion with one Lahnestein, and without receiving any of the cotton called for by the bill of lading, and without any expectation of receiving it on the part of Easton. A conspiracy had been entered into between Easton and Lahnestein to issue these bills of lading for Lahnestein's benefit. They had been guilty of similar transactions. The court held that under these circumstances, the agent was acting beyond the scope of his authority, and therefore the railroad company was not bound. Whether this decision was sound or not it was based upon precedents, and ever since has been recognized as the law of the land by the federal courts as well as by some of the State courts. This ruling has resulted in great losses to the buyers of merchandise who have the right to depend upon the bona fides of bills of lading, to bankers and financial men who have bought or discounted drafts secured by these bills of lading, and to sellers and buyers of cotton, grain, or other merchandise whose transactions are discredited by reason of the frauds which have been perpetrated by fraudulent shippers conspiring with freight agents. As a result millions of dollars have been lost to commerce. The pending bill, Section 22, modifies the law as laid down in the Friedlander case, by declaring: 'That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (a) the consignee named in a straight bill, or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part



of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.' The Committee will not take the time to discuss all of the features of the bill, but among the most important, they desire to call attention to the following: 1. Duplicate bills of lading. 2. Altered bills of lading. 3. Spent bills of lading. 4. Shipper's load and count. 5. Forgeries. The proposed regulations with regard to duplicate bills of lading are found in sections 4 and 5 and 15, which read as follows: 'Sec. 4. That order bills issued in a State for the transportation of goods to any place in the United States on the continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to any one who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however,* that nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing. Sec. 5. That when more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the continent of North America, except Alaska and Panama, the word 'duplicate' or some other word or words indicating that the document is not an original bill shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damages caused by his failure so to do to any one who has purchased the bill for value and good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however,* That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word 'duplicate' thereon, or to im-



pose the liabilities set forth in this section for failure so to do. Sec. 15. That a bill, upon the face of which the word 'duplicate' or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.' Section 13 provides:

'That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.' Many frauds have been committed in the commercial world by using bills of lading after the goods have been delivered, and which have not been taken up or cancelled. Frequently they have been used for securing credit, although the goods called for have been delivered. The railroads have not been liable because they have been able to prove the delivery of the goods. Sections 11 and 12 of the bill remedy these abuses. They read as follows: 'Sec. 11. That except as provided in section 29, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiations of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding that delivery was made to the person entitled thereto. Sec. 12. That except as provided in section 26 and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill has been issued and fails either—(a) to take up statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure

to deliver all the goods specified in the bill to any one who for value and in good faith purchases it, whether and cancel the bill, or (b) to place plainly upon it a such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding that such delivery was made to the person entitled thereto.' Many abuses have arisen by carriers marking bills of lading 'shipper's load and count.' This of course affects their value for banking and credit purposes. These abuses are sought to be remedied by section 20 and 21 of the bill, which provide: 'Sec. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods if package freight, and ascertain the kind and quantity of bulk freight and such carriers shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, 'shipper's weight, load, and count,' or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein. Sec. 21. That when goods are loaded by a shipper at a place where the carrier maintains an agency, such carrier shall, on written request of such shipper, and when given a reasonable opportunity by the shipper so to do, count the packages of goods if package freight, and ascertain the kind and quantity if bulk freight, within a reasonable time after such written request, and such carrier shall not, in such cases, insert in a bill of lading, or in any notice, receipt, contract, rule, regulation, or tariff, 'shipper's weight, load, and count,' or other words of like purport indicating that the goods were loaded by the shipper and the description of them made by him. If so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.' While the laws of the several States penalize the forging of bills of lading, it is believed, because of the fact that approximately 99 per cent of our commerce is interstate or foreign in character, there should be some federal legislation mak-

ing the forging and issuing of forged bills of lading punishable by federal courts. This is done by section 41 of the pending bill, which is as follows: 'That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, within intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provisions of this Act shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.' It is not intended by this report to call special attention to all of the provisions of the bill. They are self-explanatory."

## CHAPTER XIX.

### THE INTERSTATE COMMERCE COMMISSION—ITS NATURE, FUNCTIONS, POWERS AND DUTIES.

- Sec. 352. Necessity of a National Commission to Enforce Federal Legislation Regulating Railroads.
- Sec. 353. Statutory Provision Creating the Interstate Commerce Commission.
- Sec. 354. Amendments of 1906 and 1917 Increasing Membership and Salaries of the Commissioners.
- Sec. 355. Commission an Administrative Body Exercising Quasi Judicial Functions
- Sec. 356. General Statement of Powers and Duties of Commission over Interstate Carriers.
- Sec. 357. Commission Authorized to Divide its Members into Divisions.
- Sec. 358. Three Divisions of Commission Established Pursuant to Foregoing Amendment.
- Sec. 359. Limitation upon Powers of Commission in Regulating Interstate Carriers and Transportation.
- Sec. 360. Commission Without Authority to Compel Carriers to Acquire and Furnish Special Kind of Cars.
- Sec. 361. Duty to Furnish Cars for Interstate Shipments a Judicial Question for Courts and not Administrative in Character.
- Sec. 362. Maximum Rates and Charges for Interstate Transportation may be Prescribed by Commission.
- Sec. 363. Proposed Advances in Rates may be Suspended by Commission Pending Investigation of Propriety.
- Sec. 364. Amendment of 1917 Prohibiting Filing of Increased Rates without Approval of Commission.
- Sec. 365. Rules of Carriers Governing Distribution, Exchange, Interchange and Return of Cars.
- Sec. 366. Statute Compelling Carriers to Establish Through Routes and Joint Rates upon Order of Commission, Valid.
- Sec. 367. Powers of, and Limitations Upon, Commission in Establishing Through Routes and Joint Rates.
- Sec. 368. When Commission may Establish Through Routes and Maximum Joint Rates between Rail and Water Lines.
- Sec. 369. Jurisdiction of Commission in Connection with Transportation to Adjacent Foreign Countries.
- Sec. 370. Commission may not Compel a Carrier to Receive and Switch Carload Freight to Industries on its Terminals.
- Sec. 371. Commission may Authorize Carriers to Charge Less for Longer than for Shorter Distance.
- Sec. 372. Commission may Authorize Rail Carriers to Continue Ownership of Water Lines.



- Sec. 373. Commission may Prescribe the Forms of all Schedules or Rates and Charges.
- Sec. 374. Charges by Shippers against Carriers for Services Connected with Transportation under Control of Commission.
- Sec. 375. Commission may Formulate Regulations for the Transportation of Explosives.
- Sec. 376. Switch Connections may be Ordered by the Commission, When.
- Sec. 377. Forms of all Accounts, Records and Memoranda of Carriers Subject to Control of Commission.
- Sec. 378. Power of Commission over Rail Carriers Discriminating against Steamship Lines to Foreign Countries.
- Sec. 379. Rail Rates Reduced to Meet Water Competition may not be Raised without Permission of Commission.
- Sec. 380. Physical Connection between Line of Rail Carriers and Water Carriers may be Established by Commission.
- Sec. 381. Maximum Proportional Rates by Rail to and From Ports may be Established by Commission, When.
- Sec. 382. Commission Without Jurisdiction to Regulate Charges in Connection with 28-Hour Livestock Law.
- Sec. 383. Commission Required to Make Annual Reports to Congress
- Sec. 384. Rules and Regulations for Inspection of Locomotive Boilers Controlled by Commission.
- Sec. 385. Carriers Required to Make Monthly Reports of all Accidents to Commission.
- Sec. 386. Commission May Require Annual Reports from all Common Carriers Subject to Statute.
- Sec. 387. Power of Commission over Safety Appliances on Railroad Cars and Engines.
- Sec. 388. Commission Empowered to Investigate Railroad Accidents and to Make Reports.

§ 352. **Necessity of a National Commission to Enforce Federal Legislation Regulating Railroads.** The creation of a national commission or other special tribunal to be charged with the duty of carrying out and enforcing national legislation for the regulation of interstate transportation and carriers was recognized and recommended by the Cullom Committee in its report to Congress accompanying the proposed bill to regulate commerce. "The commission proposed in the bill herewith reported," said the Committee,<sup>1</sup> "is not designed to be a substitute for specific regulation, but it is de-

1. Report of the Committee on Interstate Commerce, Senate Report 1st Session, 49th Congress.

signed and believed to be a valuable auxiliary agency in facilitating and securing the enforcement of whatever regulations may be prescribed by Congress. \* \* \* In the light of all the evidence and the facts before it, the committee has become satisfied that no statutory regulations which may be enacted can be made fully effective without providing adequate and suitable machinery for carrying them into execution. 'What is everybody's business is nobody's business,' and the conclusion seems irresistible that specific enactments must inevitably fail to remedy the evils they are designed to cure unless an executive board be organized for the special purpose of securing their enforcement. Such enactments cannot possibly be self-enforcing, and whenever attempts have been made to control or regulate commercial transactions it has been found necessary to do so through a special instrumentality. Whatever policy of regulation may be adopted, whether it be the most conservative or the most radical that can be suggested, and from whatever point of view the question of regulation may be regarded, we are convinced that the proposed commission will prove equally essential and valuable in carrying into effect such remedial legislation as may be enacted for the protection of the people against the grievances of which they complain."

§ 353. **Statutory Provision Creating the Interstate Commerce Commission.** Section 11 of the Interstate Commerce Act as originally enacted provides for the establishment of a commission to be known as the Interstate Commerce Commission and to be composed of five commissioners appointed by the President by and with the advice of the Senate. This section further provided: "The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Com-

missioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission."

**§ 354. Amendments of 1906 and 1917 Increasing Membership and Salaries of the Commissioners.** By an act of June 29, 1906, being now Section 24 of the Interstate Commerce Act, the number of the commissioners composing the Interstate Commerce Commission was increased from five to seven with terms of seven years and each to receive a salary of \$10,000 annually. This amendment further provides: "The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full terms of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same politi-



cal party.' The Commission was further enlarged in 1917 by an amendment providing that it shall consist of nine members.<sup>2</sup>

§ 355. **Commission an Administrative Body Exercising Quasi Judicial Functions.** The Interstate Commerce Commission is a body corporate with power as such to sue and be sued in the courts.<sup>3</sup> It is an expert tribunal with relation to transportation rates and charges;<sup>4</sup> but it is not a court.<sup>5</sup> The Commission, although clothed with quasi judicial functions, is an administrative body.<sup>6</sup> Proceedings before the Commission are not judicial; but quasi judicial and administrative in their nature.<sup>7</sup> The nature and function of the Commission were well summarized by Judge Jackson in a pioneer and leading opinion, as follows: "But does the interstate commerce law undertake either to create an 'inferior court' or to invest the commission appointed thereunder with judicial functions? We think not. While the commission possesses and exercises certain powers and functions resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the act designates as the 'recommendation,' 'report,' 'order,' or 'requirement' of the board is neither final nor conclusive; nor is the com-

2. Act of Aug. 9, 1917. Appendix A, *infra*.

3. Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 Sup. Ct. 844.

4. Interstate Commerce Commission v. Louisville & N. R. Co., 118 Fed. 613.

5. Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; Interstate Commerce Commission

v. Cincinnati, N. O. & T. P. R. Co., 64 Fed. 981.

6. United States v. Reading Co., 183 Fed. 427; Western New York & P. R. Co. v. Penn Refining Co. of Oil City, Pennsylvania, 70 C. C. A. 23, 137 Fed. 343; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 76 Fed. 183; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 64 Fed. 981.

7. Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409.



mission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the law, we are clearly of the opinion that the commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court, or its action judicial, in the proper sense of the term. The commission hears, investigates, and reports upon complaints made before it, involving alleged violations of or omission of duty under the act; but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself or the party interested, of its order or report in all cases where the party complained of or against whom its decision is rendered does not yield voluntary obedience thereto. By the fourteenth and sixteenth sections of the act it is provided that the report or findings made by the commission 'should thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.' The commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the law, the commission may be regarded as the general referee of each and every circuit court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations recognized and imposed by the act. It is neither a federal court under the constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings. This federal commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce committed by the constitution to the exclusive care and jurisdiction of congress, the same

functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners, has not been successfully questioned, when limited to that local or internal commerce over which the states have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of congress, under its sovereign and exclusive power to regulate commerce among the several states, to create like commissions for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. What one sovereign may do in respect to matters within its exclusive control, the other may certainly do in respect to matters over which it has exclusive authority.”<sup>8</sup>

**§ 356. General Statement of Powers and Duties of Commission over Interstate Carriers.** The statute authorizes and requires the Commission to execute and enforce the provisions of the Interstate Commerce Act. It may inquire into the management of the business of all the common carriers subject to the statute and may obtain from them full and complete information necessary to enable it to perform its duties and to carry out the business for which it was created. Under the statute it is required to keep itself informed as to the manner and method in which the business of all common carriers is conducted. The Commission may also direct the United States District attorneys to institute and prosecute, under the direction of the attorney general, all necessary proceedings for the enforcement of the provisions of the Act, and for the punishment of all violations thereof.<sup>9</sup>

8. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567.

9. Section 12 of the Act to Regulate Commerce, Appendix A, *infra*.

§ 357. **Commission Authorized to Divide its Members into Divisions.** By an amendment passed in 1917,<sup>10</sup> the Interstate Commerce Commission was authorized to divide the members thereof into as many divisions as it may deem necessary, which may be changed from time to time. The amendatory statute is as follows: "The Commission is hereby authorized by its order to divide the members thereof into as many divisions as it may deem necessary, which may be changed from time to time. Such divisions shall be denominated, respectively, division one, division two, and so forth. Any commissioner may be assigned to and may serve upon such division or divisions as the commission may direct, and the senior in service of the commissioners constituting any of said divisions shall act as chairman thereof. In case of vacancy in any division, or of absence or inability to serve thereon of any commissioner there-to assigned, the chairman of the commission, or any commissioner designated by him for that purpose, may temporarily serve on said division until the commission shall otherwise order. The commission may by order direct that any of its work, business, or functions arising under this Act, or under any Act amendatory thereof, or supplemental thereto, or under any amendment which may be made to any of said Acts, or under any other Act or joint resolution which has been or may hereafter be approved, or in respect of any matter which has been or may be referred to the commission by Congress or by either branch thereof, be assigned or referred to any of said divisions for action thereon, and may by order at any time amend, modify, supplement, or rescind any such direction. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the commission. In conformity with and subject to the order or orders of the commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to

10. Act of August 9, 1917, Appendix A, *infra*.



any of said work, business, or functions so assigned or referred to it for action by the commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the commission, subject to rehearing by the commission, as provided in section sixteen hereof for rehearing cases decided by the commission. The secretary and seal of the commission shall be the secretary and seal of each division thereof. In all proceedings before any such divisions relating to the reasonableness of rates or to alleged discriminations not less than three members shall participate in the consideration and decision; and in all proceedings relating to the valuation of railway property under the Act entitled 'An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities,' approved March first, nineteen hundred and thirteen, not less than five members shall participate in the consideration and decision. The salary of the secretary of the commission shall be \$5,000 per annum. Nothing in this section contained, or done pursuant thereto, shall be deemed to divest the commission of any of its powers."

**§ 358. Three Divisions of Commission Established Pursuant to Foregoing Amendment.** Following the enactment of the foregoing amendment authorizing the Commission to divide itself into divisions, the Interstate Commerce Commission, on October 17, 1917, reconstituted itself into three divisions. The order creating the three divisions with the work assigned to each, is as follows: "It is ordered, That, except as



otherwise provided by the Commission, for the purposes of this amendment to the act to regulate commerce the Commission be and hereby is divided into three divisions numbered, respectively, Division 1, Division 2, and Division 3. It is further ordered, That Commissioners McChord, Meyer and Aitchison shall constitute Division 1; that Commissioners Clark, Daniels, and Woolley shall constitute Division 2; and that Commissioners Harlan, Hall and Anderson shall constitute Division 3. Each division so constituted shall have power and authority by a majority thereof to hear, determine, order, certify, report, or otherwise act as to any of the work, business or functions assigned or referred to it. Each or any of such divisions, with regard to any case or matter assigned to it, or any question brought to it under this delegation of duty and authority, may call upon the whole Commission for advice and counsel, or for consideration of the case or question by an additional commissioner or commissioners assigned thereto by the whole Commission; and the Commission may bring before it as such any case or question so allotted or assigned. It is further ordered, That to Division 1 be assigned all cases set for argument beginning October 24, to and including Oct. 31, 1917, and that in addition thereto Division 1 be charged with the conduct of the work of the Bureau of Valuation other than considering and deciding the proceedings relating to the valuation of carriers' property; that to Division 2 be assigned all cases set for argument beginning November 1 to and including Nov. 30, 1917, and in addition thereto Division 2 be charged with the disposition of applications and requests for suspension under the fifteenth section; of applications under the fourth and sixth sections; of cases on the special docket; of the transportation of explosives and dangerous articles; and of tariffs carrying released rates; that to Division 3 be assigned all cases set for argument beginning December 1 to and including Dec. 31, 1917, and in addition thereto Division 3 be charged with the disposition of all Board of Review cases which have been submitted and those not hereafter orally argued before the Commission or any

division thereof. And it is further ordered (1) That all cases set for argument and all cases submitted, other than Board of Review cases, in any one month after Jan. 1, 1918, be assigned in monthly rotation to the respective divisions in the order given above; (2) that matters arising in connection with assigned cases shall be disposed of by the division to which such cases have been assigned; (3) that all procedural questions requiring Commission action arising in connection with unassigned cases may be disposed of by any of the divisions; (4) that miscellaneous administrative matters requiring Commission action, not otherwise provided for, may be disposed of by any division; (5) that the foregoing assignment shall not include the consideration and disposition of valuation cases; and (6) that each division may determine the time and place for its hearings and conferences and determine its order of business.”

**§ 359. Limitation upon Powers of Commission in Regulating Interstate Carriers and Transportation.** A marked distinction exists between the powers of Congress and the Interstate Commerce Commission in regulating interstate carriers and transportation. Congress may exercise its authority without limit and its power is full and complete, subject only to the limitations of the commerce clause; but the Interstate Commerce Commission can only exercise such power and authority as is granted to it by statutory enactments. When it attempts to regulate interstate commerce and the agencies and instrumentalities thereof, it must find a specific delegation of authority from Congress in a statute for the power exercised. In making its orders and decisions under the Act to Regulate Commerce, the Commission must place its finger upon the statute which gives it authority. It can exercise no functions except such as are expressly conferred upon it.<sup>11</sup>

11. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896.

**§ 360. Commission Without Authority to Compel Carriers to Acquire and Furnish Special Kind of Cars.**

The Interstate Commerce Commission has the power to regulate the distribution of cars which the carrier possesses in such a manner as to prevent undue discrimination among shippers in times of shortage.<sup>12</sup> But although the statute provides that the term "transportation" includes cars and other vehicles instrumentalities of carriage, and compels carriers subject to the statute, to provide such transportation upon a reasonable request therefor, the Interstate Commerce Commission has no authority or jurisdiction to compel a carrier to acquire and provide cars of a special type. Neither does the statute clothe the Commission with the authority to determine what kind of cars should be used for the shipment of commodities.<sup>13</sup> In the case of *Pennsylvania Paraffin Works v. Pennsylvania R. Co.*,<sup>14</sup> the Interstate Commerce Commission upon the complaint of an oil company, ordered a common carrier to provide and furnish, upon reasonable request, and notice, at complainant's refineries, tank cars in sufficient num-

12. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Illinois Cent. R. Co. v. Mulberry Coal Co.*, 238 U. S. 275, 59 L. Ed. 1306, 35 Sup. Ct. 760; *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U. S. 121, 59 L. Ed. 867, 35 Sup. Ct. 484; *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. 155; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164; *Interstate Commerce Commission v. Chicago & A. R. Co.*, 215 U. S. 479, 54 L. Ed. 291, 30 Sup. Ct. 163; *Montana, W. & S. R. Co. v. Mor-*

*ley*, 198 Fed. 991; *Majestic Coal & Coke Co. v. Illinois Cent. R. Co.*, 162 Fed. 810; *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497; *United States ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co.*, 125 Fed. 252; *United States ex rel. Coffman v. Norfolk & W. Ry. Co.*, 109 Fed. 831; *Railroad Commission of Ohio v. Hocking Valley Ry. Co.*, 12 I. C. C. 398; *Riddle, Dean & Co. v. Pittsburgh & L. E. R. Co.*, 1 I. C. C. 371, 1 I. C. R. 688.

13. *United States v. Pennsylvania R. Co.*, 242 U. S. 208, 61 L. Ed. 251, 37 Sup. Ct. 95.

14. 34 I. C. C. 179. See also a similar order, *Vulcan Coal Min. Co. v. Illinois Cent. R. Co.*, 33 I. C. C. 52.



bers to transport the complainant's normal shipments in interstate commerce. The carrier resisted the order on the ground that the Commission had no authority to require it to increase its tank car equipment. An injunction was granted by the District Court suspending the order of the Commission.<sup>15</sup> Upon writ of error, the Supreme Court held that the Commission did not have such power as was attempted to be exercised. "The Act as it was enacted in 1887," said the Court,<sup>16</sup> "defined the term 'railroad' and the term 'transportation,' the latter as follows: And the term 'transportation,' shall include all instrumentalities of shipment or carriage.' The definition was very comprehensive, and needed not the mobilization of its denotation; but this subsequently was attempted. Words, indeed, were multiplied—was meaning changed? In 1906 the term 'transportation' was defined to 'include cars and other vehicles and all instrumentalities and facilities of shipment or carriage . . . ' The words are not much less general than the words of the Act of 1887. There is no advance made by them or enlargement of meaning. There was simply a useless tautology. But granting it was not and that Congress deemed a special declaration of things to be necessary, such declaration did not alter the relation of the companies to them. The duty which attached to 'instrumentalities' of the Act of 1887 attached to the things covered by its comprehensive generality,—to the things declared in the amendment of 1906; that is, to 'cars,' 'vehicles,' 'facilities.' And this duty under the Act of 1887, we have seen, had, in the opinion of the Commission, the sanction only of the common law. Under the amendment the most that can be said is that the duty is particularized. Its sanction is not enlarged. But other words occur which, it is contended, have such effect. These words are: 'And it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request there-

15. *Pennsylvania R. Co. v. United States*, 227 Fed. 911.

16. *United States v. Pennsylvania R. Co.*, 242 U. S. 208, 61 L. Ed. 251, 37 Sup. Ct. 95.



for . . . ' This, however, is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do, he must do 'upon reasonable request.' The duty having been imposed, it necessarily could be demanded. But the expression of the right, if it needed expression, adds nothing of indication to the previous words of the tribunal by which the demand was to be enforced. But it is said the duty having explicit declaration, the power to enforce it was found in Section 12 as amended March 2, 1899, as follows: 'And the Commission is hereby authorized and required to execute and enforce the provisions of this act.' (25 Stat. at L. 855, 858, chap. 382, Comp. Stat. 1913, Sections 8569, 8576.) But this casts us back to our general considerations, to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether, under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts, or under the statute and in the Commission; and we have seen that it was the view of the Commission that the remedy was in the courts, and that the amendment of 1906 was not intended to and did not change the remedy. In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation. *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 333, et seq., 59 L. Ed. 598, 35 Sup. Ct. Rep. 363."

**§ 361. Duty to Furnish Cars for Interstate Shipments a Judicial Question for Courts and not Administrative in Character.** As a result of the decision of the Supreme Court in *United States v. Pennsylvania R. Co.*, supra, holding that the Commission, in the absence of unlawful discrimination had no power under the

Interstate Commerce Act to compel a carrier to provide and furnish cars upon reasonable request therefor, the opinion of the minority of the commissioners in *Vulcan Coal and Mining Co. v. Illinois Cent. R. Co.*<sup>17</sup> properly states the law as to the authority of the Commission. While the duty to furnish cars upon reasonable request is required by the Act, this obligation is merely declaratory of the common law duties of a carrier.<sup>18</sup> The Interstate Commerce Commission is primarily and essentially an administrative body exercising powers which are legislative in their nature, and which are delegated to it by Congress. In the original act, as well as in the amendments, Congress refrained from conferring upon the Commission any jurisdiction or power which properly belongs to the judiciary branch of the government. The question of requiring a carrier to provide itself with additional facilities or respond in damages for failure so to do, is essentially a judicial question for the courts and not a delegated legislative power in the Commission.<sup>19</sup>

**§ 362. Maximum Rates and Charges for Interstate Transportation may be Prescribed by Commission.** Whenever the Interstate Commerce Commission is of the opinion that any individual or joint rates or charges of any kind demanded or collected by any common carrier subject to the Interstate Commerce Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone, as defined in the first section of the Act, or that any individual or joint classifications, regulations or practices of any kind of such carrier, are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the Interstate Commerce Act, the Commission may deter-

17. 33 I. C. C. 52, 71.

19. *Vulcan Coal and Mining Co.*

18. *Pennsylvania R. Co. v. United States*, 227 Fed. 911.

*v. Illinois Cent. R. Co.*, 33 I. C. C. 52, 71.

mine and prescribe<sup>20</sup> what will be a just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed by such companies as the maximum to be charged, and what individual or joint classification, regulation or practice is just, fair and reasonable, to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the order shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.<sup>21</sup>

**§ 363. Proposed Advances in Rates may be Suspended by Commission Pending Investigation of Propriety.** Prior to the passage of the Mann-Elkins Act of 1910, there was no check upon the initiative of a carrier in establishing new rate schedules. Advances in rates and charges could be made by filing and publishing a schedule in accordance with the requirements of the statute and the scheduled rate thus filed was presumed to be reasonable. A direct proceeding before the Commission, upon complaint, was necessary to determine whether the new rate filed conformed to the standard required by law—a just and reasonable rate. The Commission could not stay any advanced rate without a long delay incident to a hearing and a proper investigation. Even the authority of the courts to restrain the

20. For history of amendment giving this power to the Commission, see section 68, *supra*.

21. Section 15 of the Act to Regulate Commerce, appendix A, *infra*.



enforcement of unreasonable rates or a change to unjust and discriminatory rates pending an investigation by the Commission, was doubtful.<sup>22</sup> To remedy this situation, Congress, as a part of the Mann-Elkins Act, passed an amendment to section 15, which is as follows: "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order in reference to such rate, fare, charge, classi-

22. In the following cases it was held that the collection of unreasonable rates could be enjoined by the courts pending a determination of the matter by the Interstate Commerce Commission: *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Ass'n*, 91 C. C. A. 39, 165 Fed. 1; *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 158 Fed. 193; *Jewett Bros. & Jewett v. Chicago,*

*M. & St. P. Ry. Co.*, 156 Fed. 160.

*Contra*: *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 152 C. C. A. 552, 239 Fed. 718; *M. C. Kiser Co. v. Central of Georgia Ry. Co.*, 236 Fed. 573; *Columbus Iron & Steel Co. v. Kanawha & M. R. Co.*, 101 C. C. A. 621, 178 Fed. 261; *Atlantic Coast Line R. Co. v. Macon Grocery Co.*, 92 C. C. A. 114, 166 Fed. 206.



fication, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: Provided, That if any such hearing cannot be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." Under this amendment, the Commission is authorized to suspend the operation of proposed changes in rate schedules until the propriety and reasonableness thereof may be investigated.<sup>23</sup> This power includes the right to suspend reduction in rates where the effect of such suspension will prevent an obvious or apparent unjust discrimination.<sup>24</sup> Since the enactment of the amendment of 1910, the burden of proof to show that an increased rate or a proposed increased rate is just and reasonable, is upon the carrier.<sup>25</sup>

23. *Western Rate Advance Case*, 38 I. C. C. 114; *In re advances Switching, Galesburg, Illinois*, 31 I. C. C. 294; *In re Advances Coal from Oak Hills, Colorado*, 30 I. C. C. 505; *Wickwire Steel Co. v. New York Cent. & H. River R. Co.*, 30 I. C. C. 415; *Western Rate Advance Case*, 20 I. C. C. 307.

24. *Board of Trade of Chicago v. Illinois Cent. R. Co.*, 26 I. C. C. 545; *In re Packing-house Products*, 21 I. C. C. 68.

25. *East Jersey R. & T. Co. v. Central R. of New Jersey*, 36 I. C. C. 146; *In re advances Rates in Chicago Switching District*, 34

I. C. C. 234; *In re Rates on Hay to Chicago*, 34 I. C. C. 150; *Empire Coke Co. v. Buffalo & S. R. Co.*, 31 I. C. C. 573; *In re advances Commodity Rates between Missouri River Points*, 28 I. C. C. 265; *Wisconsin State Millers Ass'n v. Chicago, M. & St. P. Ry. Co.*, 23 I. C. C. 494; *In re Potato Rates*, 23 I. C. C. 69; *Davis Sewing Machine Co. v. Pittsburgh, C. C. & St. L. Ry. Co.*, 22 I. C. C. 291; *City of Spokane v. Northern P. Ry. Co.*, 21 I. C. C. 400; *Railroad Commission of Nevada v. Southern P. Co.*, 21 I. C. C. 329; *In re Locomotive & Tender Rates*, 21 I. C. C. 103;

§ 364. **Amendment of 1917 Prohibiting Filing of Increased Rates without Approval of Commission.** A further limitation was placed upon interstate carriers in filing schedules prescribing increased charges by an amendment to section 15, enacted in 1917,<sup>26</sup> which provides that until January 1, 1920, no increased rate, fare, charge, or classification, shall be filed, except after approval thereof has been secured from the Commission. Such approval may, in the discretion of the Commission, be given without formal hearing, and, in such a case, shall not affect any subsequent proceeding relative to such rate, fare, charge or classification.

§ 365. **Rules of Carriers Governing Distribution, Exchange, Interchange and Return of Cars.** By an amendment enacted in 1917 to the Act to Regulate Commerce,<sup>27</sup> the subject matter of car service, that is, the rules and regulations governing the movement, distribution, exchange, interchange and return of cars used in the transportation of property by all carriers subject to the statute, was placed under the jurisdiction of the Commission. This amendment is as follows: "The term 'car service' as used in this Act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this Act. It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the com-

In re Grain Product Rates, 21 I. C. C. 22; Western Rate Advance Case, 20 I. C. C. 307; Eastern Advance Rate Case, 20 I. C. C. 243.

26. Act of August 9, 1917, Appendix A, *infra*.

27. Act of May 29, 1917. Appendix A, *infra*.

mission may, in its discretion, direct that the said rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the Act relating thereto. The commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules. Whenever the commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission, and also authority to make such just and reasonable directions with respect to car service during such times as in its opinion will best promote car service in the interest of the public and the commerce of the people. The directions of the commission as to car service may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with any direction or order with respect to car service, such carrier, receiver, or trustee shall be liable to a penalty of not less than \$100 nor more than \$500 for each such offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States."



§ 366. **Statute Compelling Carriers to Establish Through Routes and Joint Rates upon Order of Commission, Valid.** The validity and constitutionality of the amendments of 1906 and 1910<sup>28</sup> to section 15 of the Act to Regulate Commerce compelling carriers engaged in interstate and foreign commerce to establish through routes and joint rates after hearing before the Commission when they have voluntarily failed or neglected to do so, has been affirmed by the national Supreme Court.<sup>29</sup> In *Paducah Board of Trade v. Illinois Cent. R. Co.*,<sup>30</sup> upon a complaint that the rates on logs and lumber to Paducah, Ky., from points in Louisiana and Arkansas were unjustly discriminatory as compared with the rates from the same producing territory to Cairo, Ill., the Commission ordered the carriers to establish through routes to Paducah from the Louisiana and Arkansas points and joint rates applicable via such through routes no higher than the rates maintained from the same points to Cairo, Ill. Thereafter, upon a petition of the carriers to set aside the order, it was held to be valid and enforceable by a federal district court,<sup>31</sup> and, upon appeal to the federal Supreme Court, the decree dismissing the bill was sustained. "The carriers deny," said Mr. Justice Brandeis, "that the Commission has the power to compel them to establish through routes and joint rates. It is admitted that all the complaining carriers were interstate railroads and were engaged otherwise in interstate commerce. It is undisputed that for many years there has been over the lines of two of these carriers a through route to Paducah via Cairo, and over the other a through route via Memphis; and that on all the lines there were through rates. But it is contended that if a carrier establishes a through route and joint rate with its connections, it creates in effect a relation of partnership; that this relation must be entered into, if at all, voluntarily; and that to 'compel a carrier chartered by

28. Section 72, *supra*.

29. *St. Louis Southwestern R. Co. v. United States*, 245 U. S. 136, 62 L. Ed. —, 38 Sup. Ct. 49.

30. 37 I. C. C. 719.

31. *St. Louis Southwestern Ry. Co. v. United States*, 234 Fed. 668.



a state' to enter into such a relation with a carrier chartered in another state violates the Fifth Amendment of the federal Constitution. The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. *Atlantic Coast Line Case*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. No reason appears why the regulation might not take the form of compelling the substitution of a joint rate for a through rate made by a combination of local rates or by a combination of a local rate with a joint rate to an intermediate point. *Cincinnati, New Orleans & Texas Railway v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. So far as the order relates to the existing routes via Cairo and Memphis respectively it did no more than this: It substituted for the through rate of 22 cents (made up on two of the lines of a combination of a joint rate or local rate of 16 cents to Cairo with a local rate on the Illinois Central of 6 cents from Cairo to Paducah), a joint rate of 16 cents from the 'blanket territory' to Paducah; thus reducing the existing through rate. The carrier connecting at Cairo (the Illinois Central) and all but one of the carriers connecting with these complainants in the 'blanket territory,' acquiesced in the order establishing this joint rate. The Illinois Central's share of the 22-cent rate was its local rate of 6 cents. If these complaining carriers cannot reach satisfactory agreements with the Illinois Central as to what its share of the 16-cent rate should be, they may, under section 15 of the Act to Regulate Commerce (Comp. St. 1916, sec. 8583), apply to the Commission for an appropriate order. In respect to the Rock Island the situation is similar. The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. If they elect to continue existing through route via Cairo, the order operates merely to introduce reduced

joint rates. If they elect to discontinue the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify. That Congress has power to authorize the Commission to enter an order for through routes and joint rates, like that here complained of, has been heretofore assumed. No reason is shown for questioning its existence now. The provisions of the Act to Regulate Commerce as amended (1887, c. 104, sections 1, 12, 15, 24 Stat. 379; 1906, c. 3591, sec. 4, 34 Stat. 584; 1910, c. 309, sec. 12, 36 Stat. 539, 552 (Comp. St. 1916, sections 8563, 8576, 8583) are also appropriate to confer this authority upon the Commission. And there is no foundation in fact or law for the contention of complainants that the 'Commission disregarded the provision of section 15, by which it is prohibited from embracing in a through route 'less than the entire length of a' railroad 'unless to do so would make the route unreasonably long.' Whether a carrier engaged solely in intrastate commerce could be compelled by Congress to enter interstate commerce, or even whether a carrier, having entered into some interstate commerce, may be compelled to enter into all, we have no occasion to consider; for the complaining carriers had voluntarily entered into the particular class of interstate commerce with Paducah to which alone the order related."

**§ 367. Powers of, and Limitations Upon, Commission in Establishing Through Routes and Joint Rates.** The Interstate Commerce Commission has no power to establish through routes or joint rates when the transportation is wholly by water<sup>32</sup> or between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character.<sup>33</sup> But it may, after hearing, establish through routes,

32. For history of amendments granting and extending the authority of Commission over joint rates and through routes, see Section 72, *supra*.

33. Chicago, O. & P. Ry. Co. v. Chicago & N. W. Ry. Co., 33 I. C. C. 573; Board of Trade of Louisville v. Indianapolis, C. & S. T. Co., 27 I. C. C. 499; St. Louis, S.

joint classifications and joint rates, and prescribe the division of such rates, and the terms and conditions under which through routes shall be operated, whenever carriers, subject to the Act, refuse or neglect to establish such through routes, joint classifications or joint rates.<sup>34</sup> These powers extend even when one of the connecting carriers is a water line.<sup>35</sup> In the establishment of such through routes no carrier may be compelled, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route un-

& P. R. Co. v. Peoria & P. U. Ry. Co., 26 I. C. C. 226.

34. Paducah Board of Trade v. Illinois Cent. R. Co., 37 I. C. C. 719; Federal Sugar Refining Co. v. Central R. of New Jersey, 35 I. C. C. 488; Nitro Powder Co. v. West Shore R. Co., 35 I. C. C. 77; Corporation Commission of N. C. v. Atchison, T. & S. F. R. Co., 33 I. C. C. 487; Michigan Bean Jobbers' Ass'n v. Grand Rapids & I. Ry. Co., 33 I. C. C. 318; American National Live Stock Ass'n v. Southern P. Co., 32 I. C. C. 438; Mobile Chamber of Commerce v. Mobile & O. R. Co., 32 I. C. C. 272. Burford v. Louisville & N. R. Co., 31 I. C. C. 182; Tampa Board of Trade v. Louisville & N. R. Co., 30 I. C. C. 377; Rogers & Prinkey v. Baltimore & O. R. Co., 30 I. C. C. 32; In re advances Lumber, Or. & Wash. to Eastern Points, 29 I. C. C. 609; Toledo Produce Exchange v. Ann Arbor R. Co., 27 I. C. C. 536; Southwestern Mo. Millers' Club v. St. Louis & S. F. R. Co., 26 I. C. C. 630; Omaha Grain Exchange v. Chicago, B. & Q. R. Co., 26 I. C. C. 553; Texas Cement Plaster Co. v. St. Louis &

S. F. R. Co., 26 I. C. C. 508; Blakeley S. R. Co. v. Atlantic Coast Line R. Co., 26 I. C. C. 344.

35. Port Huron & D. S. S. Co. v. Pennsylvania R. Co., 35 I. C. C. 475; Spartanburg Chamber of Commerce v. Southern Ry. Co., 34 I. C. C. 484; Kansas City, Missouri River Nav. Co. v. Chesapeake & O. Ry. Co. 34 I. C. C. 67; Stone's Exp. v. Boston & M. R. Co., 33 I. C. C. 638; Chattanooga Packet Co. v. Illinois Cent. R. Co., 33 I. C. C. 384; New York Dock Ry. Co. v. Baltimore & O. R. Co., 32 I. C. C. 568; Eastern Shore Development S. S. Co. v. Baltimore & O. R. Co., 32 I. C. C. 238; Pacific Nav. Co. v. Southern P. Co., 31 I. C. C. 472; Decatur Nav. Co. v. Louisville & N. R. Co., 31 I. C. C. 281; Milwaukee Produce & Fruit Exchange v. Crosby Transp. Co., 30 I. C. C. 653; Tampa Board of Trade v. Louisville & N. R. Co., 30 I. C. C. 377; Truckers Transfer Co. v. Charleston & W. C. Ry. Co., 27 I. C. C. 275; Augusta & S. S. S. Co. v. Ocean S. S. Co. of Savannah, 26 I. C. C. 380; Murray Litherage & Transp. Co. v. Delaware & H. Co., 25 I. C. C. 388.



less such through route would thereby be unreasonably long as compared with another practicable through route which could otherwise be established.<sup>36</sup>

**§ 368. When Commission may Establish Through Routes and Maximum Joint Rates between Rail and Water Lines.** When common carriers transport property from one point to another in the United States by rail and water through the Panama Canal or otherwise, the transportation not being entirely within the limits of a single state, the Commission has jurisdiction of such transportation and of the rail and water carriers participating therein to establish through routes and maximum joint rates between and over such rail and water lines, and may determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.<sup>37</sup>

36. *St. Louis, I. M. & S. Ry. Co. v. United States*, 217 Fed. 80; *Ogden Gateway Case v. Denver & R. G. R. Co.*, 35 I. C. C. 131; *Merchants & Manufacturers Ass'n v. Central R. of New Jersey*, 30 I. C. C. 396; *In re advances Lumber from North Pacific Coast*, 30 I. C. C. 111; *Hughes' Creek Coal Co. v. Kanawha & M. Ry. Co.*, 29 I. C. C. 671; *Wichita Board of Trade v. Abilene & S. Ry. Co.*, 29 I. C. C. 376; *Richmond-Eureka Mining Co. v. Eureka N. Ry. Co.*, 29 I. C. C. 62; *Waverly Oil Works Co. v. Pennsylvania R. Co.*, 28 I. C. C. 621; *Iowa Railroad Commissioners v. Arizona E. R. Co.*, 28 I. C. C. 563; *United States v. Union P. R. Co.*, 28 I. C. C. 518; *Haverhill Box Board Co. v. Boston & A. R. Co.*, 28 I. C. C. 336; *In re advances Cotton Seed and Products, from Texas*, 28 I. C. C. 219; *In re Coal Rates to Milwaukee, Wisconsin*, 27 I. C. C. 223; *In re Lumber Rates from Mississippi*, 27 I. C. C. 6; *Mansfield Hardwood Lum-*

*ber Co. v. Tremont & G. R. Co.* 26 I. C. C. 138.

37. Section 6 of the Act to Regulate Commerce, Appendix A; *Lamb-Fish Lumber Co. v. Yazoo & M. V. R. Co.*, 38 I. C. C. 278; *Black & White River Transp. Co. v. Missouri P. Ry. Co.*, 37 I. C. C. 244; *Pine Bluff Traffic Bureau v. Louisville & N. R. Co.*, 37 I. C. C. 218; *Federal Sugar Refining Co. v. Central R. Co. of New Jersey*, 35 I. C. C. 488; *Port Huron & Duluth S. S. Co. v. Pennsylvania R. Co.*, 35 I. C. C. 475; *Damon v. Crosby Transp. Co.*, 33 I. C. C. 448; *Chattanooga Packet Co. v. Illinois Cent. R. Co.*, 33 I. C. C. 384; *New York Dock Ry. Co. v. Baltimore & O. R. Co.*, 32 I. C. C. 568; *Eastern Shore Development S. S. Co. v. Baltimore & O. R. Co.*, 32 I. C. C. 238; *Pacific Nav. Co. v. Southern P. Co.*, 31 I. C. C. 472; *Louisiana Sugar Planters Ass'n v. Illinois Cent. R. Co.*, 31 I. C. C. 311; *Bowling Green Business Men's Protective Ass'n v. Evansville & B. G.*



§ 369. **Jurisdiction of Commission in Connection with Transportation to Adjacent Foreign Countries.** The Commission has no authority to prescribe joint through rates from an adjacent foreign country into the United States; but it can control the rates which carriers charge from the ports of entry in the United States to destinations in the United States, whether they are joint rates or separately established rates applicable to the through transportation.<sup>38</sup> The extent of the authority of the Commission in connection with transportation to an adjacent foreign country is over that portion on the line within the confines of the United States.<sup>39</sup> The Commission has not, therefore, authority to regulate charges for the transportation of commodities from Vancouver, Canada to New York.<sup>40</sup>

§ 370. **Commission may not Compel a Carrier to Receive and Switch Carload Freight to Industries on its Terminals.** Section 3 of the Act to Regulate Commerce provides that the statute shall not be construed to require any carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business; but if a carrier chooses voluntarily to throw open its terminals to many branches of traffic, it thereby denies itself the protection of the statute and makes its terminal a public convenience.<sup>41</sup> Section 15 of the

P. Co., 31 I. C. C. 301; Decatur Nav. Co. v. Louisville & N. R. Co., 31 I. C. C. 281; Tampa Board of Trade v. Louisville & N. R. Co., 30 I. C. C. 377; Seattle Shingle Co. v. Chicago, M. & St. P. Ry. Co., 30 I. C. C. 364; Railroad Commission of Florida v. Atlantic Coast Line R. Co., 28 I. C. C. 356; Truckers Transfer Co. v. Charleston & W. C. Ry. Co., 27 I. C. C. 275; In re Wharfage Facilities at Pensacola, Florida, 27 I. C. C. 252; Augusta & S. S. S. Co. v. Ocean S. S. Co. of Savannah, 26 I. C. C. 280.

38. Carey Mfg. Co. v. Grand Trunk W. Ry. Co., 36 I. C. C. 203.

39. International Paper Co. v. Delaware & H. Co., 33 I. C. C. 270; Fullerton Lumber & Shingle Co. v. Bellingham, B. & B. C. R. Co., 25 I. C. C. 375; Black Horse Tobacco Co. v. Illinois Cent. R. Co., 17 I. C. C. 588.

40. Carlowitz & Co. v. Canadian P. R. Co., 46 I. C. C. —.)

41. Louisville & N. R. Co. v. United States, 238 U. S. 1, 59 L. Ed. 1177, 35 Sup. Ct. 696.

Act provides that no carrier may be required to join in a through route which includes substantially less than all its line of railroad between the termini of the route, unless to do so would make such route unreasonably long. Construing these provisions of the statute, the Commission formerly held that terminal yards and tracks of a carrier were subject to the jurisdiction of the Commission, and in establishing through routes and joint rates, such terminals stood in the same light as any other part of the railroad.<sup>42</sup> Applying this rule, an order was made requiring a carrier to receive cars from another carrier for the purpose of switching them to industries located on its own tracks and terminals in the same city;<sup>43</sup> but on rehearing, the Commission held that, in its original order and report, it exceeded its powers under the statute in requiring the defendant to receive cars of interstate freight from the complainant for delivery to industries located on its tracks in the same city.<sup>44</sup> The proviso in section 3 of the act protects a carrier that has secured and built up valuable terminals, without which its railroad would be of little use, against having those terminals utilized by a competing carrier that has not provided itself with adequate terminals and that desires to thus secure the line haul which the carrier owning the terminals is prepared to perform and which the other carrier cannot secure unless its cars have the use of the terminals of its competitor.<sup>45</sup> The refusal of a carrier to receive from or deliver to another carrier entering the same city, interstate shipments destined to or originating at industries on the former's tracks, is not a violation of the statute, because the performance of such a switching service would require the carrier so refusing, to participate in through routes which would include substantially less than its

42. *Waverly Oil Works Co. v. Pennsylvania R. Co.*, 28 I. C. C. 621; *St. Louis, S. & P. R. Co. v. Peoria & P. U. R. Co.*, 26 I. C. C. 226.

43. *Iowa & S. W. Ry. Co. v. Chicago, B. & Q. R. Co.*, 32 I. C. C. 172.

44. *Iowa & S. W. Ry. Co. v. Chicago, B. & Q. R. Co.*, 42 I. C. C. 389.

45. *Louisville Board of Trade v. Louisville & N. R. Co.*, 40 I. C. C. 679.

entire line of railroad between the termini of such routes, and would contravene the proviso of section 3 which protects the terminals of a carrier.<sup>46</sup>

**§ 371. Commission may Authorize Carriers to Charge Less for Longer than for Shorter Distance.** Carriers are prohibited under the provisions of Section 4 of the statute from charging or receiving any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of the statute.<sup>47</sup> The Interstate Commerce Commission is, however, authorized, upon the application of a carrier, in special cases, and after investigation, to permit a carrier to charge less for a longer than for a shorter distance for the transportation of passengers or property.<sup>48</sup> The Com-

46. *Kansas City & M. Ry. Co. v. St. Louis & S. F. R. Co.*, 46 I. C. C. 464.

47. For history of amendments to Section 4 see Section 79, *supra*.

48. *United States v. Merchants' and Manufacturers' Traffic Ass'n of Sacramento*, 242 U. S. 178, 61 L. Ed. 233, 37 Sup. Ct. 24; *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 Sup. Ct. 363; *United States v. Louisville & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113; *United States v. Atchison, T. & S. F. R. Co.*, 234 U. S. 476, 58 L. Ed. 1408, 34 Sup. Ct. 986; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 190 U. S. 273, 47 L. Ed. 1047, 23 Sup. Ct. 687; *East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. 516; *Louis-*

*ville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. 209; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 144, 42 L. Ed. 414, 18 Sup. Ct. 45; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 16 Sup. Ct. 666; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Nashville Grain Exchange v. United States*, 234 Fed. 699; *Merchants' and Manufacturers' Traffic Ass'n of Sacramento v. United States*, 231 Fed. 292; *Louisville & N. R. Co. v. United States*, 225 Fed. 571; *Graham & G. C. Traffic Ass'n v. Arizona E. R. Co.*, 40 I. C. C. 573; *Inland Seed Co. v. Oregon-Washington R. & N. Co.*, 40 I. C. C. 517; *Young v. Louisville & N. R. Co.*,

mission may, from time to time, prescribe the extent to which a common carrier may be relieved from the operation of Section 4.

**§ 372. Commission may Authorize Rail Carriers to Continue Ownership of Water Lines.** Interstate rail and other carriers subject to federal control are, since July 1, 1914, prohibited from owning lines or having any interest whatever in water lines or vessels carrying freight or passengers if they actually compete or may compete for traffic with such water lines or vessels.<sup>49</sup> The question whether competition actually exists or is possible between such rail carriers and water lines must be determined by the Commission. However, if any service by water other than through the Panama Canal main-

40 I. C. C. 308; *Berry Coal & Coke Co. v. Chicago, R. I. & P. Ry. Co.*, 40 I. C. C. 175; *In re Reopening Fourth Section Applications*, 40 I. C. C. 35; *Henderson Cotton Mills v. Louisville & N. R. Co.*, 39 I. C. C. 399; *City of Marshall v. Texas & P. Ry. Co.*, 39 I. C. C. 249; *Bennett & Son v. Chesapeake & O. Ry. Co.*, 38 I. C. C. 310; *McCaull-Dinsmore Co. v. Great N. Ry. Co.*, 38 I. C. C. 297; *Rates on Iron & Steel Articles*, 38 I. C. C. 237; *Merchants Produce Co. v. Oregon-Washington R. & N. Co.*, 38 I. C. C. 209; *National Rolling Mill Co. v. Chicago & E. I. R. Co.*, 38 I. C. C. 108; *Brownsville Cotton Oil & Ice Co. v. Chicago, R. I. & P. Ry. Co.*, 37 I. C. C. 503; *Hottelet & Co. v. Chesapeake & O. Ry. Co.*, 37 I. C. C. 382; *Duncan & Co. v. Nashville, C. & St. L. R. Co.*, 35 I. C. C. 477; *Board of Trade of Kansas City v. Chicago, M. & St. P. Ry. Co.*, 34 I. C. C. 208; *In re Commodity Rates to Pacific Coast Terminals*, 34 I. C. C. 13; *Railroad Commissioners of Mon-*

*tana v. Atchison, T. & S. F. R. Co.*, 32 I. C. C. 316; *Railroad Com'rs of Montana v. Butte, A. & P. Ry. Co.*, 31 I. C. C. 641; *In re advances on Boots and Shoes from Boston, Mass.*, 31 I. C. C. 154; *In re Tropical Fruits from Gulf Ports*, 30 I. C. C. 621; *In re Fourth Section v. Southeastern Roads*, 30 I. C. C. 153; *Stewart-Greer Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 29 I. C. C. 120; *Maier & Co. v. Southern P. Co.*, 29 I. C. C. 103; *Texarkana Freight Bureau v. St. Louis, I. M. & S. Ry. Co.*, 28 I. C. C. 569; *Blakely S. R. Co. v. Atlantic Coast Line R. Co.*, 26 I. C. C. 344; *In re Southern Ry. Co.*, 25 I. C. C. 407; *Appalachia Lumber Co. v. Louisville & N. R. Co.*, 25 I. C. C. 193; *Bowling Green Business Men's Protective Ass'n v. Louisville & N. R. Co.*, 24 I. C. C. 228; *In re Fourth Section*, 24 I. C. C. 192; *City of Spokane v. Northern P. Ry. Co.*, 21 I. C. C. 400; *Railroad Commission of Nevada v. Southern P. Co.*, 21 I. C. C. 329.

49. Section 97, *supra*.



tained by a rail carrier, is of advantage to the convenience and commerce of the people, is being operated in the interest of the public and the continuance of such service will not exclude, prevent nor reduce competition on the water route, the Commission is authorized, under the statute, to extend the time during which such service by water may continue to be operated by a common carrier by railroad.<sup>50</sup>

**§ 373. Commission may Prescribe the Forms of all Schedules of Rates and Charges.** The Interstate Commerce Commission is authorized to determine and prescribe the form in which the schedules required by Section 6, to be kept open to public inspection, shall be prepared and arranged, and is authorized to change the form from time to time. No changes may be made in the rates, fares and charges of any common carrier or any joint rates, fares and charges which shall have been filed and published by any common carrier except after thirty days notice to the Commission. But the Commission may, however, in its discretion and for good cause shown, allow changes in such rates, fares and charges upon less than the thirty days notice required.<sup>51</sup>

**§ 374. Charges by Shippers against Carriers for Services Connected with Transportation under Control of Commission.** When a shipper of freight transported in interstate or foreign commerce and subject to the Interstate Commerce Act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the Commission may, after hearing on a complaint or on its own initia-

50. Central Vermont Boat Lines, 40 I. C. C. 589; Delaware & H. Boat Lines, 40 I. C. C. 297; Maine Central Boat Lines, 40 I. C. C. 272; Ashtabula-Port Maitland Car Fare Service, 40 I. C. C. 143; Southern P. Co's ownership of Oil Steamers, 37 I. C. C. 528; Peninsular & O. S. S. Co., 37 I.

C. C. 432; Ocean S. S. Co. of Savannah, 37 I. C. C. 422; In re Steamer Lines on Chesapeake Bay and Tributaries, 35 I. C. C. 692; In re Southern P. Co., ownership of Oil Steamers, 34 I. C. C. 77; Lake Line Applications under Panama Canal Act, 33 I. C. C. 699.

51. Chapter 13, *supra*.

tive, determine what shall be a reasonable charge as the maximum to be paid by a carrier for the service so rendered, or for the use of the instrumentality so furnished.<sup>52</sup> The Commission is authorized to fix the

52. Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814; United States v. Louisiana & P. R. Co., 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 58 L. Ed. 568, 34 Sup. Ct. 291; United States v. Baltimore & O. R. Co., 231 U. S. 274, 58 L. Ed. 218, 34 Sup. Ct. 75; Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916; Union Pac. R. Co. v. Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 Sup. Ct. 39; Interstate Commerce Commission v. Dittenbaugh, 222 U. S. 42, 56 L. Ed. 83, 32 Sup. Ct. 22; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; Chicago & A. R. Co. v. United States, 212 U. S. 563, 53 L. Ed. 653, 29 Sup. Ct. 689; Louisiana & P. Ry. Co. v. United States, 209 Fed. 244; Wisconsin Cent. R. Co. v. United States, 94 C. C. A. 444, 169 Fed. 76; Ohio Coal Co. v. Whitcomb, 59 C. C. A. 487, 123 Fed. 359; Union Lumber Co. v. Gulf, C. & S. F. Ry. Co., 37 I. C. C. 225; Felin & Co. v. Philadelphia & R. Ry. Co., 37 I. C. C. 231; In re Allowances on Anthracite Coal, 36 I. C. C. 164; In re advances Car-spotting Charges, 34 I. C. C. 609; Second Industrial Rys. Case, 34 I. C. C. 596; Atchison, T. & S. F. Ry. Co. v. Kansas City Stock Yards Co., 33 I. C. C. 92; Best Co. v. Great N. Ry. Co., 33

I. C. C. 1; New York Dock Ry. Co. v. Baltimore & O. R. Co., 32 I. C. C. 568; Inman, Akers & Inman v. Atlantic Coast Line R. Co., 22 I. C. C. 146; Colonial Salt Co. v. Chicago, B. & Q. R. Co., 31 I. C. C. 559; Industrial Rys. Case, 29 I. C. C. 212; Manufacturers' Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 28 I. C. C. 93; Southwestern Missouri Millers Club v. St. Louis & S. F. R. Co., 26 I. C. C. 245; Traffic Bureau of St. Louis v. Chicago, B. & Q. R. Co., 22 I. C. C. 496; Suffern Grain Co. v. Illinois Cent. R. Co., 22 I. C. C. 178; Sterling & Son Co. v. Michigan C. R. Co., 21 I. C. C. 451; International Salt Co. of Illinois v. Genesee & W. R. Co., 20 I. C. C. 530; Industrial Lumber Co. v. St. Louis W. & G. Ry. Co., 19 I. C. C. 50; Fathauer Co. v. St. Louis, I. M. & S. Ry. Co., 18 I. C. C. 517; Crane Iron Works v. Central R. Co. of New Jersey, 17 I. C. C. 514; Star Grain & Lumber Co. v. Atchison, T. & S. F. Ry. Co., 17 I. C. C. 338; Crane R. Co. v. Philadelphia & R. Ry. Co., 15 I. C. C. 248; Kaye & Carter Lumber Co. v. Chicago, M. & St. P. Ry. Co., 14 I. C. C. 604; Solvay Process Co. v. Delaware, L. & W. R. Co., 14 I. C. C. 246; General Elec. Co. v. New York, C. & H. R. Co., 14 I. C. C. 237; National Wholesale Lumber Dealers Ass'n v. Atlantic Coast Line R. Co., 14 I. C. C. 154; Topeka Banana Dealers Ass'n v. St. Louis & S. F. R. Co., 13 I. C. C. 620; In re Elevator Allowances

maximum charge by appropriate order which shall have the same force and effect and be enforced as other orders provided by the statute.

**§ 375. Commission may Formulate Regulations for the Transportation of Explosives.** The Commission is authorized by statute to formulate regulations for the safe transportation of explosives, which shall be binding upon all common carriers engaged in interstate or foreign commerce and transporting explosives by land. The Commission may also, upon its own motion, or upon application by any interested party, make changes or modifications in such regulations. These regulations, as well as all changes or modifications thereof, shall take effect ninety days after their formulation and publication by the Commission, and shall be in effect until reversed, set aside or modified.<sup>53</sup>

**§ 376. Switch Connections may be Ordered by the Commission, When.** Upon the application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, it becomes the duty of any common carrier subject to the statute to construct and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable, can be put in with safety and will furnish sufficient business to justify its construction and maintenance. Upon the construction of the switching connection the carrier is required to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any such carrier shall fail to install and operate any such switch or connection, on application therefor

by Union P. Ry. Co., 12 I. C. C. 85; Central Yellow Pine Ass'n v. Illinois Cent. R. Co., 10 I. C. C. 505; Shamburg v. Delaware, L. & W. R. Co., 4 I. C. C. 630; Rice

v. Louisville & N. R. Co., 1 I. C. C. 503.

53. Transportation of Explosives Act, 35 Stat. at L. 1134, Appendix P, *infra*.

in writing by any shipper or owner of a lateral, branch line of railroad, such shipper or owner of such lateral, branch line of railroad, may make complaint to the Commission, and the Commission is authorized to hear and investigate the same and to determine as to the safety and practicability of the connection and the justification and reasonable compensation therefor. The Commission may make an order directing any common carrier to comply with the above requirements and such order shall be enforced as provided by statute for the enforcement of all other orders by the Commission, other than orders for the payment of money.<sup>54</sup>

**§ 377. Forms of all Accounts, Records and Memoranda of Carriers Subject to Control of Commission.** The Commission is authorized to prescribe the forms of any and all accounts, records and memoranda to be kept by common carriers subject to its control, including the accounts, records and memoranda of the movement of traffic as well as the receipts, and expenditures of moneys. When so prescribed by the Commission, it shall be unlawful for any carrier to keep any other accounts, records or memoranda than those approved by the Commission. The Commission shall, at all times, have access to the accounts, records and memoranda kept by the carriers, and it may employ special agents or examiners who shall have authority under the order of the Commission, to inspect and examine any and all accounts, records and memoranda kept by the carriers

54. *United States v. Baltimore & O. S. W. R. Co.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5; *Interstate Commerce Commission v. Northern Pac. R. Co.*, 216 U. S. 538, 54 L. Ed. 608, 30 Sup. Ct. 417; *Huerfano Coal Co. v. Colorado & S. E. R. Co.*, 28 I. C. C. 502; *Morris Iron Co. v. Baltimore & O. R. Co.*, 26 I. C. C. 240; *Ralston Townsite Co. v. Missouri P. Ry. Co.*, 22 I. C. C. 354; *Ridgewood Coal Co. v. Lehigh Valley R. Co.*, 21

I. C. C. 183; *Cincinnati & C. T. Co. v. Baltimore & S. W. R. Co.*, 20 I. C. C. 486; *Imperial Wheel Co. v. St. Louis, I. M. & S. Ry. Co.*, 20 I. C. C. 56; *Winter's Metallic Paint Co. v. Chicago, M. & St. P. Ry. Co.*, 16 I. C. C. 587; *Rahway V. R. Co. v. Delaware, L. & W. R. Co.*, 14 I. C. C. 191; *Welectka Light & Water Co. v. Fort Smith & W. R. Co.*, 12 I. C. C. 503; *McRae Terminal Ry. Co. v. Southern Ry. Co.*, 12 I. C. C. 270.



subject to federal control. In case of failure or refusal on the part of any carrier, receiver or trustee of a railroad to keep such accounts, records and memoranda on the books and in the manner prescribed by the Commission or to submit such accounts, records and memoranda as are kept to the inspection of the Commission, or any of its authorized agents or examiners, such carrier, receiver, or trustee, shall forfeit to the United States the sum of Five Hundred Dollars for each offense and for each and every day's continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided in the statute. Any examiner who divulges any fact or information which may come to his knowledge during the course of the examination of the books, records and accounts of any carrier except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than Five Thousand Dollars or imprisonment for a term not exceeding two years or both.<sup>55</sup>

**§ 378. Power of Commission over Rail Carriers Discriminating against Steamship Lines to Foreign Countries.** If a rail carrier subject to federal control enters into arrangements with any water carrier operating from a port in the United States to a foreign country through the Panama Canal or otherwise, for the handling of through business between interior points in the United States and such foreign country, the Commission has the power, under the statute, to require such rail carrier to enter into similar arrangements with any other lines of steamships operating from the same port to the same foreign country. Such orders, however, cannot be made by the Commission except upon a formal complaint or in proceedings instituted by the Commission of its own motion and after a full hearing.<sup>56</sup>

55. Section 20 of the Act to Regulate Commerce, Appendix A, *infra*.

1 Control Carriers 42

56. Section 6 of the Act to Regulate Commerce, Appendix A, *infra*.

§ 379. **Rail Rates Reduced to Meet Water Competition may not be Raised without Permission of Commission.** Whenever a rail carrier operating in competition with a water carrier, reduces the rates for the transportation of any specie of freight to or from a competitive point, such rates cannot be increased thereafter by the carrier unless the Interstate Commerce Commission shall find after a hearing that the proposed increase rests upon changed conditions other than the elimination of water competition.<sup>57</sup>

§ 380. **Physical Connection between Line of Rail Carriers and Water Carriers may be Established by Commission.** When property may be or is transported by common carriers from one point to another in the United States by rail and water, the transportation not being entirely within the limits of a single state, the Commission has jurisdiction of such transportation and of the rail and water carriers engaged therein, to establish physical connections between the line of a rail carrier and the dock of a water carrier by directing the rail carrier to make suitable connections between its line and the tracks which may have been constructed from the dock to its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track to the dock. Such connection cannot, however, be required unless it is reasonably practicable, can be made with safety to the public, and the amount of business is sufficient to justify the outlay. The Commission has full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The foregoing provisions

57. Section 4 of the Act to *infra*. This provision was inserted by amendment in 1910.

extend to cases where the dock is owned by other parties than the carrier involved.<sup>58</sup>

**§ 381. Maximum Proportional Rates by Rail to and From Ports May be Established by Commission, When.** When property may be or is transported from one point to another in the United States by rail and water, the transportation being by common carriers and not entirely within the limits of a single state, the Commission has jurisdiction of such transportation and of such carriers, both by rail and by water, which participate therein, to establish maximum proportional rates by rail to and from the ports to which such traffic is brought, or from which it is taken by the water carrier, and may determine to what traffic and in connection with what vessels and upon what terms and conditions, such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply to traffic which has been brought to the port or is carried from the port by a common carrier by water. An order of the Commission establishing such maximum proportional rates can be made only upon a formal complaint, or in a proceeding instituted by the Commission of its own motion, and after a full hearing.<sup>59</sup>

**§ 382. Commission Without Jurisdiction to Regulate Charges in Connection with 28-Hour Livestock Law.** The Act of June 29, 1906<sup>60</sup> prohibits carriers, over whose lines animals shall be conveyed, from confining the same in cars for a period longer than 28 consecutive hours, 36 hours in excepted cases, without unloading them into properly equipped pens for rest, water and feed, for a period of at least 5 consecutive hours,

58. Section 6 of the Act to Regulate Commerce, Appendix A, *infra*; *Indiana Transp. Co. v. Grand Rapids, H. & C. Ry. Co.*, 39 I. C. 757.

59. Section 6 of the Act to Regulate Commerce, Appendix A,

*infra*; *Charleston & N. S. S. Co. v. Chesapeake & O. Ry. Co.*, 40 I. C. 382.

60. 34 Stat. at L, 607, known as the Federal 28-Hour Livestock Law. Appendix L, *infra*.

and also provides that the animals shall be properly fed and watered during such rest, either by the owner or person having custody thereof, or, in case of his default in so doing, then by the railroad transporting the same, at the reasonable expense of the owner. This statute does not vest in the Commission authority to enforce its provisions. As the Commission possesses only such powers as are expressly conferred upon it by statute, it has no authority to pass upon the reasonableness of a charge collected by a carrier from a shipper for feeding and watering a carload of animals in compliance with the 28-Hour Law.<sup>61</sup>

**§ 383. Commission Required to Make Annual Reports to Congress.** The Commission is required to make and transmit to Congress an annual report on or before the first day of December in each year, which must contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary. The report must also contain the names and compensation of the persons employed by the Commission.<sup>62</sup>

**§ 384. Rules and Regulations for Inspection of Locomotive Boilers Controlled by Commission.** Common carriers by railroad engaged in interstate or foreign commerce are required to promulgate rules and instructions for the inspection of boilers of locomotive engines used upon their railroads. After hearing and approval by the Commission, such rules and instructions, with such modifications as the Commission may require, shall become obligatory upon such carriers. If any carrier

61. *Pacific Coast Beef & Provision Co. v. Oregon Short Line R. Co.*, 46 I. C. C. —; *Streever Lumber Co. v. Chicago, M. & St. P. Ry. Co.*, 34 I. C. C. 1.

62. Section 21 of the Act to Regulate Commerce, Appendix A, *infra*.



shall fail to file such rules and instructions with the chief inspector of the Commission, he may prepare rules and instructions to be observed by the carrier, which, upon approval by the Commission, shall be obligatory after a copy thereof is served upon the president, general manager or general superintendent of such carrier. No rule or regulation shall be changed until the same shall have been filed with and approved by the Commission. The statute also provides for an appeal to the Commission from the decision of the chief inspector upon the question whether any locomotive is equipped as required by law or is in serviceable condition.<sup>63</sup>

**§ 385. Carriers Required to Make Monthly Reports of all Accidents to Commission.** Under such rules and regulations that may be prescribed by the Commission, every common carrier engaged in interstate or foreign commerce by railroad, through its general manager, superintendent or other proper officer, is required to make to the Commission at its office in Washington, D. C., a monthly report, under oath, of all collisions, derailments or other accidents resulting in injury to persons, equipment or roadbed arising from the operation of a railroad. Such report shall state the nature and cause of the accident and the circumstances connected therewith. The Commission is authorized to prescribe for all carriers a method and form for making such reports.<sup>64</sup>

**§ 386. Commission May Require Annual Reports from all Common Carriers Subject to Statute.** The Commission is authorized to compel all common carriers subject to the act and owners of all railroads engaged in interstate commerce as defined in the statute, to file with it annual reports, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which

63. Boiler Inspection Act, 36 Stat. at L. 913, Appendix J, *infra*.

64. Accident Report Act, 36 Stat. at L. 350, Appendix N, *infra*.

the Commission may need information.<sup>65</sup> Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports must also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require. The Commission is also authorized to prescribe a period of time within which all common carriers subject to the statute shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.<sup>66</sup>

**§ 387. Power of Commission over Safety Appliances on Railroad Cars and Engines.** The authority of the Commission over the facilities and instrumentalities of interstate transportation is not circumscribed and limited by the provisions of the Act to Regulate Interstate Commerce. Under the safety appliance laws and amendments passed from time to time, the Commission has extensive powers over the safety appliances used and maintained on both freight and passenger cars and

65. *United States v. Louisville & N. R. Co.*, 236 U. S. 218, 59 L. Ed. 598, 35 Sup. Ct. 363; *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423, 58 L. Ed. 296, 34 Sup. Ct. 125; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56

L. Ed. 729, 32 Sup. Ct. 436; *United States v. Nashville, C. & St. L. Ry.*, 217 Fed. 254; *In re St. Paul & Puget Sound Accounts*, 29 I. C. C. 508.

66. Section 20 of the Act to Regulate Commerce, Appendix A, *infra*.

engines in use on interstate railroads. Its powers under these statutes are often broader than under the Interstate Commerce Act; for they extend to the appliances on cars used solely in intrastate commerce if used on a highway of interstate commerce. The specific powers of the Commission over these instrumentalities are elsewhere considered and explained.<sup>67</sup>

**§ 388. Commission Empowered to Investigate Railroad Accidents and to Make Reports.** All collisions, derailments or other accidents resulting in serious injury to person or property occurring on the line of any common carrier by railroad engaged in interstate or foreign commerce, may be investigated by the Commission. To facilitate such investigations the Commission, or any impartial investigator authorized by it, may investigate all the attending facts, conditions and circumstances, and, for that purpose, may subpoena witnesses, administer oaths, take testimony, and require the production of books, papers, orders, memoranda, exhibits and other evidence, and shall be provided by the interested carrier with all reasonable facilities. When it deems it to the public interest, the Commission shall make reports of such investigations, stating the cause, together with such recommendations as it deems proper. Such reports shall be made public in such manner as the Commission deems proper, but shall not be admitted as evidence or used for any purpose in any suit or action for damages occurring out of any matter mentioned in the report or investigation.<sup>68</sup>

67. Part IV, *infra*.

68. Accident Report Act, 36 Stat. at L. 350, Appendix N, *infra*.

## CHAPTER XX

### PROCEDURE BEFORE INTERSTATE COMMERCE COMMISSION.

- Sec. 389. Who May Make Complaints to the Commission.
- Sec. 390. Absence of Direct Damage to Complainant not Ground for Dismissal of Complaint.
- Sec. 391. Power of Commission to Proceed when Acting upon its Own Motion.
- Sec. 392. Power of Commission to Formulate Rules of Procedure.
- Sec. 393. Rules Governing Complaints Filed Before Commission.
- Sec. 394. Essentials of Complaints When Reparation is Sought.
- Sec. 395. Formal Claims for Reparation Based upon Findings of Commission
- Sec. 396. Specifications of Complaints, Answers, Briefs, Petitions, Applications, etc.
- Sec. 397. Applications to Carriers Under Fourth Section.
- Sec. 398. Suspensions of Tariff Schedules under Section 15.
- Sec. 399. Requirements of the Rules as to Answers Filed Before Commission.
- Sec. 400. Method of Serving Papers.
- Sec. 401. Amendments to Complaints or Answers in Proceedings Before Commission.
- Sec. 402. Commission May Order Testimony to be Taken by Deposition at any Stage of Proceedings.
- Sec. 403. Method of Hearing Before the Commission.
- Sec. 404. May Hold Hearings or Prosecute Inquiries Anywhere in the United States.
- Sec. 405. Continuances, Extensions of Time and Stipulations.
- Sec. 406. Commission may Compel Attendance and Testimony of Witnesses and Production of Papers.
- Sec. 407. Schedules, Contracts and Annual Reports Filed with Commission Public Records Receivable as Prima Facie Evidence, When.
- Sec. 408. Transcripts of Testimony to be Furnished Complainant and Defendant.
- Sec. 409. Rules Governing Filing of Briefs.
- Sec. 410. Orders of the Commission—Enforcement, Service of, and Duties of Carriers Thereunder.
- Sec. 411. Applications for Rehearing or Reopening before the Commission—Procedure.
- Sec. 412. Employment of Attorneys to Aid Commission Authorized.

**§ 389. Who may Make Complaints to the Commission.** The statute provides that any person, firm, corporation, company, association, or any mercantile, agri-



cultural, or manufacturing society or other organization, or any body politic or municipal corporation, railroad commissioner or railroad commission of any state or territory, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of the Act, in contravention of the provisions thereof, may apply to the Commission by petition which shall briefly state the facts. Thereupon the statute provides that a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, it shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If the carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.<sup>1</sup>

The rules of practice before the Commission provide that any complainant may appear and be heard in person or by attorney; that two or more complainants may join in one complaint against two or more defendants, if the complaint involves substantially the same principle, subject, or state of facts; that if a complaint relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment are interested, the several carriers participating in such carriage or shipments, are necessary parties defendant; that if a complaint relates to rates, regulations or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates, regulations or practices on each of said lines, all the

1. Section 13 of the Act to Regulate Commerce.

carriers operating such lines should be made defendants; that if a complaint relates to provisions of a classification, it will ordinarily be sufficient to name as defendants the carriers permitting one or more through routes between the respective points of origin and destination, and that if the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee must be made defendants in cases involving transportation over such line.<sup>2</sup>

**§ 390. Absence of Direct Damage to Complainant not Ground for Dismissal of Complaint.** The statute provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant.<sup>3</sup> In a proceeding before the Commission by a newspaper owner against certain coal-carrying railroads, the Commission ordered the production of certain contracts between the carriers and coal operators. It was contended in a suit to attack the order that the complainant before the Commission had no real interest in the case and that the proceeding should be dismissed. In rejecting this contention, the court said:<sup>4</sup> "It is urged that the complainant before the commission did not show any real interest in the case brought, and that the proceeding should for that reason have been dismissed. It is provided in the act to regulate commerce, sec. 13, that 'any person, firm, corporation,' etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof may apply to said commission by petition, etc. And certain procedure is provided for—and (said commission) 'may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made,' and the section concludes: 'No complaint shall at any

2. Rules of Practice, Appendix E. *infra*.

3. Section 13 of the Act to Regulate Commerce, Appendix A, *infra*.

4. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. 563.

time be dismissed because of the absence of direct damage to the complainant.' In face of this mandatory requirement that the complaint shall not be dismissed because of the want of direct damage to the complainant, no alternative is left the commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the commission. Power is conferred upon the commission, under section 12 of the act as amended March 2, 1889, and February 10, 1891 (3 U. S. Comp. Stat. of 1901, p. 3162), to inquire into the management of the business of all common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created. In making the orders which were the basis of the application to the Circuit Court and in the petition filed therein it is set forth that the commission at the time when the witnesses refused to produce the contracts required, was engaged 'in the discharge of its duty to execute and enforce the provisions of the act to regulate commerce and in the exercise of its authority to inquire into the business of common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which said business is conducted, and to obtain from said common carriers full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created; and your petitioner is of the opinion that said contracts are not only material and relevant to the issues on trial in said proceeding, but that the production thereof as required by it, as aforesaid, is necessary to enable your petitioner to discharge its duty and execute and enforce said provisions of said act to regulate commerce and to inform your petitioner as to the manner and method in which the business of said common carriers is conducted, and to enable your petitioner to obtain the full and complete information necessary to enable your petitioner to perform the duties and carry out the objects for which

it was created.' But in the present case, whatever may be the right of the commission to carry on an investigation under the general powers conferred in section 12, this proceeding was under the complaint filed, and we will examine the testimony offered with a view to its competency under the allegations made by the complainant."

**§ 391. Power of Commission to Proceed when Acting upon its Own Motion.** In *Harriman v. Interstate Commerce Commission*,<sup>5</sup> the Supreme Court held that when the Commission instituted an investigation upon its own motion and not upon a complaint filed, witnesses could not be compelled to testify before the Commission except in investigations by the Commission upon matters that might have been made the object of a complaint. But the effect of this decision, however, was eliminated by the amendment of 1910 to section 13 of the Act, giving the Interstate Commerce Commission full authority and power at any time to institute an inquiry, upon its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before the Commission by any provisions of the Act, or concerning which any question may arise under the provisions of the Act or relating to the enforcement of any of the provisions of the Act, and also the same power and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of the Act, including the power to make and enforce any order or orders in the case, or relating to any matter or thing concerning which the inquiry is had, except orders for the payment of money. Concerning this broad power of the Commission, the Supreme Court said:<sup>6</sup> "The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by

5. 211 U. S. 407, 53 L. Ed. 253,  
29 Sup. Ct. 115.

6. *Smith v. Interstate Commerce Commission*, 245 U. S. —  
62 L. Ed. —, 38 Sup. Ct. 30.



construction to limit it so far as the business of the carriers is concerned and their relation to the public. And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that ‘there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce.’ Turning to the specialties of the Interstate Commerce Act we find there that all charges and treatment of all passengers and property shall be just and reasonable, and there is a specific prohibition of preferences and discriminations in all the ways that they can be executed, with corresponding regulatory power in the Commission. And authority and means are given to enable it to perform its duty. By section 12 it is authorized to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carriers full and complete information. It may (section 13) institute an inquiry of its own motion, and may (section 20) require detailed accounts of all the expenditures and revenues of carriers and a complete exhibit of their financial operations and prescribe the forms of accounts, records and memoranda to be kept. And it is required to report to Congress all data collected by it. It would seem to be an idle work to point out the complete comprehensiveness of the language of these sections and we are not disposed to spend any time to argue that it necessarily includes the power to inquire into expenditures and their proper assignment in the accounts, and the questions under review, we have seen, go no further. They are incidental to an investigation as to the ‘manner and method’ (section 12) in which the business of the car-

riers is conducted; they are in requisition of a detailed account of their expenditures and revenues and an exhibit of their financial operations (section 20), and the answers to them may be valuable as information to Congress (section 21). A limitation, however, is deduced from section 13. It is said to be confined to cases where an inquiry is instituted 'as to any matter or thing concerning which a complaint is authorized to be made, or concerning which any question may arise under any provisions' of the act 'or relating to the enforcement of any of the provisions' of the act. In other words, that the inquiry is determined by the manner of procedure. The objection overlooks the practical and vigilant function of the Commission. To sustain it appellant seems to urge that there must be put into words by some complainant or by the Commission, if it move of itself, some definite charge of evil or abuse, and put into expression some definite remedy, and that an inquiry must not transcend either charge or remedy. To so transcend, appellant urges, would be an exercise of autocratic power and is condemned in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253. Appellant presses that case beyond its principle. And we may observe that section 13 has been amended and broadened since the decision of that case. The inquiry in the present case is more immediate to the function of the Commission than the inquiry in that and comes within *Interstate Commerce Commission v. Chicago, R. I. & P. Ry.*, *supra*, where it was said, at page 103 of 218 U. S., at page 656 of 30 Sup. Ct. (54 L. Ed. 946): 'The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided.' And they must necessarily be expressed in generalities. A precise specification of powers might work a limitation and all not enumerated be asserted to be withheld."

**§ 392. Power of Commission to Formulate Rules of Procedure.** The statute authorizes the Commission to conduct proceedings before it in such manner as will best conduce to the proper dispatch of business and to ends of justice. The Commission may make or amend such general rules or orders as may be required for the order and regulation of proceedings before it, or before any division of the Commission, including forms of notice and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. A majority of the Commission shall constitute a quorum for the transaction of business, except as may be otherwise provided by statute; but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Every vote and official act of the Commission or any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission may administer oaths and affirmations and sign subpoenas.<sup>7</sup>

**§ 393. Rules Governing Complaints Filed Before Commission.** Complaints filed before the Interstate Commerce Commission must be typewritten on one side of the paper only, or be printed. In either case the complaint must conform to the specifications of rule twenty-one. The names of all parties, complainant or defendant, must be stated in full, without abbreviations, and the address of each complainant, with the name and address of his attorney, if any, must appear upon each copy. The complaint need not be verified, but must be signed in ink by the complainant or his duly authorized attorney. The complainant must furnish as many complete copies of the complaint as there may be parties defendant to be served, including receivers or trustees, and three additional copies for the use of the Commis-

7. Section 17 of the Act to Regulate Commerce, appendix A, *infra*, as amended by Act of August 9, 1917.



sion. The Commission will serve the complaint upon each defendant by leaving a copy with its designated agent in the District of Columbia, or, if no such agent has been designated, by posting a copy in the office of the secretary of the Commission. Complaints should be so drawn as fully and completely to advise the defendant and the Commission wherein the provisions of the act have been violated and should set forth briefly and in plain language the facts claimed to constitute such violation. Two or more grounds of complaint involving the same principle, subject, or state of facts, may be included in one complaint, but should be separately stated and numbered. The several rates, regulations, and discriminations complained of should be set out by specific reference to the tariffs in which they appear whenever that is practicable. Where the rate attacked is one increased after January 1, 1910, the complaint should so state. In case discrimination in violation of sections 3 or 4 of the act is alleged the complaint should specify and describe the detail the particular preference or advantage to any person, company, firm, corporation, locality, or traffic, which is relied upon as constituting such discrimination. Appropriate allegation should also be made in such case to present for decision the issue as to whether or not such rates, charges, or other matters complained of are just and reasonable. In case a violation of section 4 is alleged the complaint should specify and describe in detail the particular violation of that section, giving tariff references whenever practicable.<sup>8</sup>

**§ 394. Essentials of Complaints When Reparation is Sought.** Except under unusual circumstances and for good cause shown, reparation will not be awarded unless specifically prayed for in the complaint or in an amendment thereto filed before the submission of the case. After a final order has been entered upon a complaint in which reparation is not sought or, if prayed,

8. Rule 3 of Rules of Practice before the Commission.



has been denied, the Commission will not ordinarily award reparation upon a complaint subsequently filed and based upon any finding upon the first complaint. Where reparation is sought the complaint should state (a) that complainant makes claim for reparation, (b) the name of each individual claimant asking reparation, (c) the commodities transported, (d) the names of defendants against which claim is made, (e) the period of time within which or the specific date upon which the shipments were made, and (f) the points of origin and destination, either specifically, or, where they are numerous, by a definite indication of a defined territorial or rate group of the points of origin and destination. Under a general rate adjustment challenged in the complaint, or upon many shipments under a particular rate, or where many points of origin or destination are involved, it is the practice of the Commission first to find and determine in its report as to the reasonableness of the rate or rates in issue, and whether the parties seeking reparation paid and bore the charges and are entitled to reparation, thereafter giving to such parties an opportunity to make proof respecting the shipments upon which reparation is claimed. In such cases freight bills and other exhibits bearing on the amount of reparation should be reserved until called for and should not be filed with the complaint. The parties, however, should be prepared to produce at the hearing the freight bills and other exhibits bearing on the amount of reparation, for the reason that they may become necessary in developing other facts in the case. When a claim for reparation has been before the Commission informally and the parties have been notified by the Commission that the claim is of such a nature that it can not be determined informally, or when the parties voluntarily withdraw the claim from informal consideration, or when a claim has been filed with the Commission merely to stop the running of the statute of limitations, formal complaint thereon must be filed within six months from the date of such notification, withdrawal or filing. Otherwise the parties will be deemed to have abandoned their claim and the complaint will not be entertained: Provid-

ed, however, That this rule does not apply to formal complaints for reparation filed within two years from the date of the delivery of the shipments.<sup>9</sup>

**§ 395. Formal Claims for Reparation Based upon Findings of Commission.** When the Commission finds that reparation is due, but that the amount can not be ascertained upon the record before it, the complainant should immediately prepare a statement in accordance with Form 5, showing as to each shipment upon which reparation is claimed, the date of delivery, car initials and number, points of origin and destination, route, commodity, weight, rate applied, charges collected, rate found reasonable and charges applicable thereunder, and the amount of reparation payable upon the basis of the findings. Such statements should not include any shipments which were transported upon rates other than those included in the Commission's findings nor any shipments which were delivered at destination more than two years before the complaint was informally or formally presented to the Commission. The statement should then be forwarded to the carrier which collected the charges for certification as to its accuracy. Such certification should cover not only the movement of the shipments and the amount of charges but also the amount of reparation claimed under the Commission's findings. Discrepancies, duplications, or other errors in such statements should be adjusted by the parties and an agreed statement submitted to the Commission in accordance with Form 5.<sup>10</sup>

**§ 396. Specifications of Complaints, Answers, Briefs, Petitions, Applications, etc.** All complaints, answers, petitions, applications, depositions, or other papers to

9. Rule 3 of Rules of Practice before the Commission.

In the preparation of its rules, the Commission erroneously assumed that the statute of limitation ran from the date of the de-

livery of a shipment and not from the date the freight charges were paid. See Section 302, *supra*.

10. Rule 5, Appendix E, *infra*. For Form, see Appendix E, *infra*.

be filed, if typewritten, must be on paper not more than 8½ inches wide and not more than 12 inches long, and weighing not less than 16 pounds to the ream, folio base 17 by 22 inches, with left-hand margin not less than 1½ inches wide. The impression must be on only one side of the paper. Whenever such papers are printed they, as well as briefs, must be in 10 or 12 point type, on good unglazed paper, 5⅞ inches wide by 9 inches long, with inside margin not less than 1 inch wide, and with double-ledged text and single-ledged citations.<sup>11</sup>

**§ 397. Applications to Carriers Under Fourth Section.** Any common carrier subject to the act to regulate commerce, as amended, may apply to the Commission, under the proviso clause of the fourth section, for such authorization as it is empowered to grant thereunder. Such application must be verified and conform to rule twenty-one. The application should specify the places and traffic involved, the rates, fares, or charges on such traffic for the shorter and longer distances, the carriers other than the applicant which may be interested in the traffic, the special nature of the case, the character of the hardship claimed to exist, and the extent of the relief sought by the applicant. Upon the filing of such application the Commission will take such action as the circumstances of the case require.<sup>12</sup>

**§ 398. Suspensions of Tariff Schedules under Section 15.** Suspensions of tariff schedules under section 15 of the act will not ordinarily be considered unless application therefor is made in writing at least 10 days before the time fixed in the tariff for such rates to take effect. Applications for suspensions must indicate the schedule affected by its I. C. C. number and give specific reference to the items against which protest is made, together with a statement of the grounds thereof. When application for the suspension of tariff schedules is made, seven copies of such application should be furnished.<sup>13</sup>

11. Rule 21.

12. Rule 18.

13. Rule 19.



**§ 399. Requirements of the Rules as to Answers Filed Before Commission.** Answers must be typewritten on one side of the paper only, or be printed. In either case the answer must conform to the specifications of rule twenty-one. One copy of each answer must, unless the Commission orders otherwise, be filed with the secretary of the Commission at his office in Washington, D. C., within 30 days after the day of service of the complaint, by defendants whose general offices are at or west of El Paso, Tex., Salt Lake City, Utah, or Spokane, Wash., and within 20 days by all other defendants, and a copy of each such answer must be at the same time served personally or by mail upon the complainant or his attorney. The Commission will, when advisable, shorten or extend the time for answer. Answers should be so drawn as fully and completely to advise the complainant and the Commission of the nature of the defense, and should admit or deny specifically and in detail such material allegation of the complaint. Whenever it is apparent from the complaint, either by direct allegation or otherwise, that a departure from the requirements of the fourth section of the act is involved, the answer should set forth by number the particular application or order which protects such departure. An answer denying that a discrimination is undue or unjust should explain fully wherein such discrimination is not undue or unjust. It is desired that every effort be thus made to narrow the issues upon hearing. If a defendant satisfies a complaint either before or after answering, a signed acknowledgment thereof must be filed by both parties, stating when and how the complaint has been satisfied.<sup>14</sup>

**§ 400. Method of Serving Papers.** Under rule 6, notices and copies of papers, other than complaints, depositions, and intervening petitions, must be served upon all parties personally or by mail. When any

14. Rule 4 of Rules of Practice before the Commission.



party has appeared by attorney, service upon such attorney will be deemed proper service upon the party.<sup>15</sup>

§ 401. **Amendments to Complaints or Answers in Proceedings Before Commission.** Amendments to any complaint or answer in any proceeding will be allowed or refused by the Commission at its discretion.<sup>16</sup>

§ 402. **Commission May Order Testimony to be Taken by Deposition at any Stage of Proceedings.** Any party in any proceeding or investigation pending before the Commission may take the testimony of any witness by deposition after a cause or proceeding is at issue on petition and answer. The Commission may also by order, permit depositions to be taken in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Depositions may be taken before any judge of any court of the United States, or any commissioner or clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of the deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as provided in the statute.<sup>17</sup>

§ 403. **Method of Hearing Before the Commission.** When issue is joined upon formal complaint by service of answer, or by failure of defendant to answer, the

15. Rule 6.

16. Rule 7.

17. Section 12 of the Act to Regulate Commerce, Appendix A, *infra*.

Commission will assign a time and place for hearing. Witnesses will be examined orally before the Commission or one of its examiners, unless their testimony be taken by deposition or the facts be agreed upon as provided for in these rules. At hearings on formal complaint the complainant shall open and close. At hearings upon applications for relief from any provision of the act the applicant shall open and close. At hearings of investigation and suspension proceedings the respondent shall open and close. At hearings of all other investigations, on the motion of the Commission, the Commission shall open and close, except that upon proper notice in advance of the hearing the Commission may prescribe a different order. In hearings of several proceedings upon a consolidated record the presiding commissioner or examiner shall designate who shall open and close. Interveners shall follow the party in whose behalf the intervention is made, and in all cases where the intervention is not in support of either original party the presiding commissioner or examiner shall designate the order of procedure for such interveners.<sup>18</sup>

**§ 404. May Hold Hearings or Prosecute Inquiries Anywhere in the United States.** The statute prescribes that the principal office of the Commission shall be in Washington, D. C., where its general sessions shall be held. But whenever the convenience of the public or the parties may be promoted, or delay or expense prevented, the Commission may hold special sessions in any part of the United States. It may also, by one or more of the commissioners, prosecute any inquiry necessary to its duties, in any part of the United States into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of the Interstate Commerce Act.<sup>19</sup>

18. Rule 10.

Regulate Commerce, Appendix A,

19. Section 19 of the Act to *infra*.

§ 405. **Continuances, Extensions of Time and Stipulations.** Continuances and extensions of time will be granted or denied by the Commission at its discretion. Parties to any proceeding may, by stipulation in writing filed with the secretary, or presented at the hearing, agree upon the facts, or any portion thereof, involved therein. It is desired that the facts be thus agreed upon as far as and whenever practicable.<sup>20</sup>

§ 406. **Commission may Compel Attendance and Testimony of Witnesses and Production of Papers.** For the purpose of effectively enforcing the provisions of the statute, the Commission is authorized to require, by subpoena, the attendance of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation from any place in the United States, to any designated place of hearing.<sup>21</sup> In case of disobedience to a subpoena, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States to require the attendance and testimony of any witness and the production of books, papers or documents.<sup>22</sup> Should any carrier subject to the

20. Rules 8 and 9.

21. Section 12 of the Act to Regulate Commerce, Appendix A, *infra*.

22. *Ellis v. Interstate Commerce Commission*, 237 U. S. 434, 59 L. Ed. 1036, 35 Sup. Ct. 645; *United States v. Louisville & N. R. Co.*, 236 U. S. 318, 59 L. Ed. 598, 35 Sup. Ct. 363; *United States v. Louisville & N. R. Co.*, 235 U. S. 314, 59 L. Ed. 245, 35 Sup. Ct. 113; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. Ed. 729, 32 Sup. Ct. 436; *Wilson v. United States*, 221 U.

S. 361, 55 L. Ed. 771, 31 Sup. Ct. 538, Ann. Cas. 1912D 558; *Wilson v. United States*, 220 U. S. 614, 55 L. Ed. 610, 31 Sup. Ct. 718; *Hariman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 253, 29 Sup. Ct. 115; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075; *Nelson v. United States*, 201 U. S. 92, 50 L. Ed. 673, 26 Sup. Ct. 358; *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652, 26 Sup. Ct. 370; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. Ed. 860, 24 Sup. Ct. 563; *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575, 24 Sup. Ct. 372; *Interstate Commerce Commission v. Cincinnati*,

act, or other persons refuse to obey a subpoena, any district court within the jurisdiction of which the inquiry is carried on, may issue an order requiring such carrier or other persons to appear before the Commission and give evidence touching the matter in question, and produce books and papers, if so ordered. Any failure to obey such order of the court may be punished by such court as a contempt thereof. No witness shall be excused from testifying and giving evidence because such testimony and evidence may tend to incriminate him; but such evidence or testimony shall not be used against the witness on the trial of any criminal proceeding.<sup>23</sup>

**§ 407. Schedules, Contracts and Annual Reports Filed with Commission—Public Records Receivable as Prima Facie Evidence, When.** It is further provided in section 16 of the Act that the copies of schedules and classifications and tariffs of rates, fares and charges, and of all contracts, agreements and arrangements between common carriers filed with the Commission as provided by statute, and the statistics, tables, and figures contained in the annual or other reports of carriers made to the Commission as required under the provisions of the Act shall be preserved as public records in the

N. O. & T. P. Ry. Co., 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. 896; *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, 16 Sup. Ct. 644; *Cleveland, C., C. & St. L. Ry. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041, 14 Sup. Ct. 1122; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251.

23. *Crenshaw v. State*, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. 294; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621; *American Lithographic Co. v. Werckmeister*, 221

U. S. 603, 55 L. Ed. 873, 31 Sup. Ct. 676; *Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771, 31 Sup. Ct. 538, Ann. Cas. 1912D 558; *Hammond Packing Co. v. State*, 212 U. S. 322, 53 L. Ed. 530, 29 Sup. Ct. 370, 15 Ann. Cas. 645; *Consolidated Rendering Co. v. State*, 207 U. S. 541, 52 L. Ed. 327, 28 Sup. Ct. 178, 12 Ann. Cas. 658; *Hale v. Henkel*, 201 U. S. 43, 50 L. Ed. 652, 26 Sup. Ct. 370; *Brown v. Walker*, 161 U. S. 591, 40 L. Ed. 819, 16 Sup. Ct. 644; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, 12 Sup. Ct. 195; *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. 524.



custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings. Copies of and extracts from any of the said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the secretary, under the Commission's seal, shall be received in evidence with like effect as the originals.<sup>24</sup> The rules of practice prescribe that if any portion of a tariff, report, circular, or other documents on file with the Commission, is offered in evidence in any proceeding before the Commission, the party offering the same must give specific reference to the items or pages and lines thereof to be considered; that the Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file with it, or in any annual, statistical, and other official reports of the Commission and that when it is desired to direct the Commission's attention to such tariffs or reports upon hearing or in briefs or argument, the party offering the same must give specific reference to the items or pages and lines thereof to be considered.<sup>25</sup>

**§ 408. Transcripts of Testimony to be Furnished Complainant and Defendant.** One copy of the testimony will be furnished by the Commission for the use of the complainant and one copy for the use of the defendant, without charge. If two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered. In proceedings instituted by the Commission on its own motion, including proceedings involving the suspension of tariffs, no copies of testimony will be furnished without charge.<sup>26</sup>

**§ 409. Rules Governing Filing of Briefs.** Unless otherwise specifically ordered, briefs may be filed upon

24. Section 16 of the Act to Regulate Commerce, Appendix A, *infra*.

25. Rules of Practice Appendix E, *infra*.

26. Rule 16.

application made at hearings or upon order of the Commission. Briefs must be printed in conformity with the specifications of rule twenty-one, and contain an abstract of the evidence, assembled by subjects, with reference to the pages of the record whereon the evidence appears. There should be included requests for specific findings which the parties think the Commission should make. Documentary exhibits should not be reproduced in briefs, but may, if it is desired, be reproduced in an appendix to the brief. Analyses of such exhibits should be included in the abstract of evidence under the subjects to which they pertain. In cases involving a discrimination in rates against one community or locality and in favor of another community or locality, or otherwise involving a relationship of rates, and in investigation and suspension cases, the party who is required to file the first brief shall insert therein, opposite the statement of the case, a small map or chart of the territory showing the rate structure involved. The abstract of evidence should follow the statement of the case and precede the argument. Every brief of more than 20 pages shall contain on its front flyleaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to alphabetically arranged, together with references to pages where the cases are cited. Briefs for the various parties shall be filed in the same order as governs in the taking of their testimony at hearings. At the close of the testimony in each case the presiding commissioner or examiner will fix the time for filing and service of the respective briefs as follows, unless good cause for variation therefrom is shown: For the opening brief, 30 days from close of testimony; for the brief of the opposing party, 15 days after the date fixed for the opening brief; for reply brief, 10 days after the date fixed for the brief of the opposing party. Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made, or within such other time as may be fixed by the presiding commissioner or examiner. Briefs not filed with the Commission and served so as to reach opposing counsel

on or before the dates fixed therefor will not be received except by special permission of the Commission. Parties who fail to file opening brief, as required by this rule, will not be permitted to file reply to brief of opposing party. All briefs must be filed with the secretary and be accompanied by notice, showing service upon all opposing counsel who appeared at the hearing or on brief, and 15 copies of each brief shall be furnished for the use of the Commission, unless otherwise ordered. Applications for extension of time in which to file briefs shall be by petition, in writing, stating the facts on which the application rests, which must be filed with the Commission at least five days before the time for filing such brief. Oral argument will be had only as ordered by the Commission. Applications therefor shall be made at the hearing or in writing within 10 days after the close of testimony.<sup>27</sup>

**§ 410. Orders of the Commission—Enforcement, Service of, and Duties of Carriers Thereunder.** Every order of the Commission must be forthwith served upon the designated agent of the company in the city of Washington or in such manner as may be provided by law. It shall be the duty of every common carrier, its agents and employes, to observe and comply with such orders as long as the same shall remain in effect. The Commission is authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper. Any carrier, officer, representative, or agent of any carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section 15 of the Act to Regulate Commerce shall forfeit to the United States the sum of Five Thousand Dollars for each offense. Every distinct violation shall be a separate offense and in case of a continuing violation, each day shall be deemed a separate offense. The forfeiture shall be payable into the Treasury of the

27. Rule 14.

United States, and is recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or any district through which the road of the carrier runs. The statute makes it the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecutions shall be paid out of the appropriation for the expenses of the courts of the United States. The statute further provides that if any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission, or any party injured thereby, or the United States by its Attorney General, may apply to the courts for the enforcement of such order. If, after hearing, the court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience of such order by writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives from further disobedience of such order, or to enjoin upon it or them obedience to the same.<sup>28</sup> The rules of practice before the Commission provide that if an order has been issued, the defendants named therein must promptly notify the secretary of the Commission on or before the date upon which such order becomes effective whether or not compliance has been made therewith. If a change in rates is required, the notification to the secretary must be given in addition to the filing of proper tariffs.<sup>29</sup>

**§ 411. Applications for Rehearing or Reopening before the Commission—Procedure.** The statute further provides that after a decision, order or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for re-

28. Section 16 of the Act to Regulate Commerce, Appendix A, *infra*.

29. Rules of Practice, Appendix E, *infra*.



hearing of the same, or any matter determined therein, and the Commission may, in its discretion, grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing are governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof without the special order of the Commission. When a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct. If, in the judgment of the Commission after such rehearing and a consideration of all the facts, including those arising since the first hearing, it shall appear that the original decision, order or requirement is in any respect unjust or unwarranted, the Commission may reverse, change or modify the same accordingly. The statute provides that any decision, order or requirement made after such rehearing, reversing, changing or modifying the original determination, shall be subject to the same provisions as an original order.<sup>30</sup> The rules of practice before the Commission provide that applications for reopening a proceeding after final submission, or for rehearing or reargument after a decision, must be by petition stating specifically the grounds relied upon, and copies thereof must be served by the party filing the same upon all opposing counsel who appeared at the hearing or on brief; that an application for rehearing that part of any case relating to reparation or other damage for past injuries must be filed with the Commission within 60 days after service of the order therein; that if such application be to reopen the proceeding for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be cumulative; that if the application be for a rehearing, the petition

30. Section 16a of the Act to Regulate Commerce, Appendix A, *infra*.

must specify the matters claimed to be erroneously decided with a brief statement of the alleged errors; that if any order of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance therewith, the matters relied upon by the applicant must be fully set forth; that at least 10 copies of all such applications must be filed with the Commission and be accompanied by notice showing service upon all opposing counsel; that such adverse parties may file a reply to such petition for rehearing or reopening within 10 days from the date of service upon them and that such reply must be served upon the attorney for petitioner and 10 copies must be filed with the Commission.<sup>31</sup>

**§ 412. Employment of Attorneys to Aid Commission Authorized.** The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in any investigation made by any cases or proceedings pending before it, either at the Commission's own initiative or upon complaint, or to appear for and represent the Commission in any case pending in the courts.<sup>32</sup>

31. Rules of Practice, Appendix E, *infra*.

32. Section 16 of the Act to Regulate Commerce, Appendix A, *infra*.

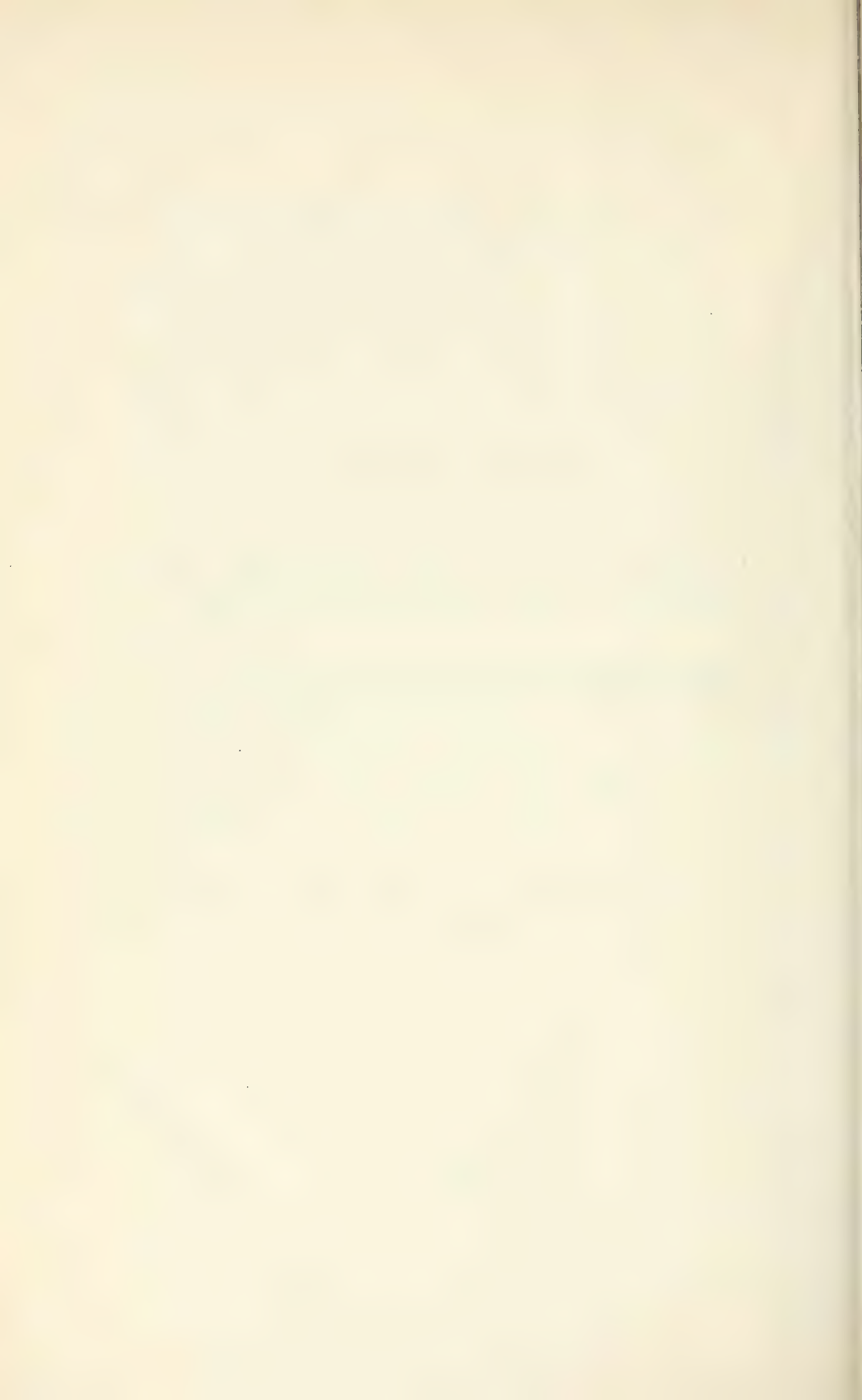
## PART THREE

---

### PERSONAL INJURIES TO INTERSTATE EMPLOYEES OF COMMON CARRIERS

---

#### THE FEDERAL EMPLOYERS' LIABILITY ACT.





## CHAPTER XXI

### SCOPE, PURPOSE, VALIDITY AND EFFECT OF FEDERAL LIABILITY ACT.

- Sec. 413. Source, Nature and Extent of Power of Congress to Regulate Relation of Master and Servant.
- Sec. 414. Employers' Liability Act of 1906 Invalid.
- Sec. 415. Second Federal Employers' Liability Act Valid.
- Sec. 416. Scope of the Federal Employers' Liability Act.
- Sec. 417. Purpose of Congress in Enactment of Federal Act—Uniformity and Modification of Common Law Rules.
- Sec. 418. Defects in Act of 1908 and Amendments of 1910.
- Sec. 419. Congressional Purpose in the Enactment of the Amendments of 1910.
- Sec. 420. Extent of Power Exercised by Congress in Passing the Liability Act.
- Sec. 421. Exclusiveness of the Federal Act and its Effect upon State Laws.
- Sec. 422. State Workmen's Compensation Laws Superseded by Federal Act as to Injuries Arising in Interstate Commerce.
- Sec. 423. Common Law Right of Parents to Recover for Loss of Services of Minor Employe Injured, Superseded.
- Sec. 424. Remedy Provided by Statute Limited to Employees Only of Common Carriers by Railroad.
- Sec. 425. Employees on Ocean-going Ships Owned by Common Carriers by Railroads not Included.
- Sec. 426. Decisions of National Courts Construing Act Control.
- Sec. 427. Laws of State Control as to Procedure.
- Sec. 428. Fellow Servant Rule Abolished as to all Interstate Employees.

§ 413. **Source, Nature and Extent of Power of Congress to Regulate Relation of Master and Servant.** Congress is authorized by the commerce clause of the Constitution to regulate interstate and foreign commerce, and to enact all laws necessary and proper for carrying into execution the powers vested in it by the Constitution. The regulation of the relation of master and servant to the extent that the legislation adopted by Congress on that subject is confined to interstate and foreign commerce, is within the constitutional grant to regulate commerce.<sup>1</sup>

1. *Texas & P. R. Co. v. Rigsby*, Sup. Ct. 482; *Houston, E. & W. T.* 241 U. S. 33, 60 L. Ed. 874, 36 R. Co. v. United States, 234 U.

Congress cannot, however, legislate upon the relationship of master and servant, as such, within the domain of the states; for its power is limited to the regulation of interstate and foreign commerce, the enactment of laws appropriate to the exercise of such power, and to prescribe the rules by which commerce shall be governed.<sup>2</sup> If persons otherwise within the exclusive control of the states<sup>3</sup> become engaged in interstate commerce, or in work which is so closely connected therewith as to be in a practical sense and in legal contemplation, a part of interstate commerce, then they subject themselves to the potential control of Congress.<sup>4</sup> It follows, therefore, that Congress may regulate the liabilities of masters to their servants for personal injuries when both are engaged in interstate commerce, or even when engaged in intrastate commerce if such work is so closely or directly connected with interstate commerce that the safety of the one is dependent upon the other.<sup>5</sup>

S. 342, 58 L. Ed. 1341, 34 Sup. Ct. 833; *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. 621; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141.

2. *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298, Ann. Cas. 1918A 1024; *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E 905; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. 364; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. 826; *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

3. *Employers Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141.

4. *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2; *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. Ed. 352, 9 Sup. Ct. 28; *Smith v. Alabama*, 124 U. S. 465, 31 L. Ed. 508, 8 Sup. Ct. 564; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Cooley v. Board Wardens Port of Philadelphia*, 12 How. (U. S.) 299, 13 L. Ed. 996.

5. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153,

**§ 414. Employers' Liability Act of 1906 Invalid.** The first Federal Employers' Liability Act passed by Congress and approved June 11, 1906, was declared invalid by the national Supreme Court, because its terms included all who engaged in interstate commerce between the states—hacks, ferries, bridges, trolley lines, telephone and telegraph companies, and railroads—as carriers as well as *all* their employes, regardless of whether the employer was engaged in or the injured servant was employed in interstate commerce at the time of the injury.<sup>6</sup> The first act included *every* individual or corpo-

Ann. Cas. 1914C 163, in which the Court said: "We entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." To the same effect: *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2.

6. *First Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141, aff'g *Howard v. Illinois Cent. R. Co.*, 148 Fed. 997, and *Brooks v. Southern Pac. Co.*, 148 Fed. 986. "But it is argued," said Mr. Chief Justice White, "even though it be conceded that the power of Congress in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it cer-

tain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to things which are wholly interstate commerce, but embraces those relations as to matters and things domestic in their character and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act. From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of



ration engaged in interstate commerce between the states and *all* their employes.

This statute was broader than the constitutional power delegated by the states to the national government, and hence was invalid as being beyond the power given to Congress. The act, however, was declared valid

the United States, or between the several States,' etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the States, etc. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the States, etc., and does not confine itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce. And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of

the statute defining the servants to whom it relates. Thus the liability of a common carrier is declared to be in favor of 'any of its employes.' As the word 'any' is unqualified, it follows that liability to the servant is coextensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employes of all carriers who engage in interstate commerce. This also is the rule as to one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from 'the negligence of any of its officers, agents or employes.' The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not



as to the District of Columbia and territories of the United States, for the reason that Congress has plenary powers in all matters relating to such territories. In the District of Columbia, the Panama Canal Zone, Alaska, Porto Rico, Hawaiian Islands and Philippine Islands, by the Act of 1906 every common carrier engaged in trade or commerce was liable "to any of its employes." As to carriers engaged in commerce between the states, the court, in the majority opinion, held that matters under the jurisdiction of the national government and those within the exclusive jurisdiction of the states, were so blended in the act that they could not be separated by the court, and therefore, the whole act as to common carriers and their employes engaged in commerce between the states, must be held void. The part of the act applying to territories, was held to be

interstate commerce, although rectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. Take again the same road having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a State as to a large part of its

business and yet as to the remainder crossing the state line. As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution."

7. The 1906 Act was valid as to these territories: *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21, aff'g 102 Tex. 378, 117 S. W. 426; *Atchison, T. & S. F. R. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. 480.

The Federal Employers' Liability Act of 1908 did not repeal that part of the Employers' Liability Act of 1906 which related to the District of Columbia and the Territories. A seaman employed on a vessel engaged in commerce within the territory of Alaska was permitted to recover under the Act of 1906. *Walsh v. Alaska Steamship Co.*, — Wash. —, 172 Pac. 269.

capable of separation by a judicial interpretation, and, as so separated, it was held valid.

In the 1906 Act Congress attempted to legislate upon a subject matter wholly within the power of the state and so interblended that power with its jurisdiction over interstate commerce, that the several clauses could not be separated, and that part covering interstate commerce remain valid.

**§ 415. Second Federal Employers' Liability Act Valid.** After the national Supreme Court declared the Act of 1906 invalid on January 6, 1908, for the reasons mentioned in the preceding paragraph, Congress passed the Second Federal Employers' Liability Act,<sup>8</sup> which was approved April 22, 1908.<sup>9</sup>

The first section provides that every common carrier by railroad while engaged in interstate commerce, shall be liable to every employe while employed by such carrier in such commerce or in case of his death, to certain beneficiaries therein named, for such injury or death, resulting in whole or in part, from the negligence of the carrier, or its employes, or by defects or insufficiencies due to negligence in any of its equipments or property. The second section provides that every common carrier by railroad on lands of the United States other than states shall be liable in the same way to any of its employes. The third section prescribes that contributory negligence shall not bar recovery, but shall

8. 35 Stat. at L. 65, Appendix F, *infra*.

The federal act is a remedial statute and should have a liberal construction to advance the remedy proposed and to correct the evils against which it was directed. *Baltimore & O. R. Co. v. Branson*, — Md. —, 98 Atl. 225.

9. The entire act without the 1910 amendments is quoted in full in *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011, which was the first case by the Missouri appellate courts constru-

ing the act. Judge Nortoni, in that case, held that the remedy provided by the act was exclusive and that a switchman on a freight train carrying freight from a point in a state to a point in another was engaged in interstate commerce and that a suit by a widow suing in her own capacity could not be maintained; in case of death, suit must be brought by the "personal representative" as required by the act. Judge Nortoni's ruling has since, in other cases, been sustained by the national Supreme Court.

only diminish the damages, except that no employe injured or killed where the violation of a safety law for employes contributed to the injury, shall be held to have been guilty of contributory negligence. The fourth section provides that assumption of risk shall not be a defense, where the violation of a safety law contributed to the accident. The fifth section declares all contract or devices intended to exempt the carrier from liability under the act to be void, except that the carrier may plead as a set-off any sum it paid to the injured employe as insurance or relief fund. Section 6 provides that any action under the act is barred after two years. Section 7 declares that the term "common carrier," as used in the statute, shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier. Section 8 provides that the act does not limit the obligation of a common carrier under any other federal law or affect any pending suits under the 1906 Act.

After conflicting decisions by state and federal courts, the constitutionality and validity of this statute in all its parts was presented to the Supreme Court of the United States and the act was declared constitutional on January 15, 1912.<sup>10</sup> In a later decision the Supreme Court held Section 5 of the national act valid.<sup>11</sup> These decisions render any discussion as to the validity of the Act of 1908 purely academic and such questions are now, so far as all other courts are concerned, finally and conclusively decided. In a pioneer case involving the validity of the Act, Judge Trieber, in holding that the statute was a proper exercise of the power of Congress under the commerce clause, said:<sup>12</sup> "As the powers of Congress are limited to those granted by the Constitution, and the only provision of that instrument

10. In re Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44.

11. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 Sup. Ct. 589, 1 N. C. C. A. 892.

12. Watson v. St. Louis, I. M. & S. Ry. Co., 169 Fed. 942.

authorizing such legislation is the commerce clause, and that is limited to 'commerce with foreign nations and among the several states and Indian tribes,' it can, of course, only legislate for the safety of those employed in those branches of commerce, and not in intrastate carriage. That is all the act under consideration attempts to do. It is limited to those who are in the employment of railroads engaged in commerce between the states and while they are actually engaged in such employment. What difference does it make what the employment of the fellow servant is—whether interstate or intrastate? The safety of the employes of an interstate train, as well as of the passengers intrusted to their care, can in no wise be affected by that. Congress having the exclusive power to regulate interstate commerce, that power necessarily includes the right to regulate the relation of the master and servant operating such trains and legislate for the safety of the employes. *Johnson v. Southern Pacific Ry. Co.*, supra; *Schlemmer v. Buffalo, etc., Ry. Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; *Employers' Liability Cases*, supra. If the contention of defendant is sustained, the effect would be that although the employe of a carrier by rail engaged in interstate transportation is injured while engaged on an interstate train, if the cause of the injury was the negligence of a fellow servant not engaged at the time in interstate work, Congress is powerless to provide for a recovery of compensation for the injuries suffered. Therefore, if an engineer or fireman on an interstate train is injured by reason of the negligence of a switchman or other employe of a train operated on a branch line, which is used exclusively for intrastate business, the failure of Congress to except such accidents from the provisions of the statute makes it unconstitutional as being in excess of its powers under the Constitution. The same result would follow if a telegraph operator on such a branch line fails to transmit or deliver a message from the train dispatcher directing the conductor of the interstate train to go on a siding for the purpose of letting an intrastate train pass on the main line, and by reason of such negligence



there is a collision. In *State v. Chicago, Milwaukee & St. Paul R. Co.* (Wis.) 117 N. W. 686, the court, speaking of a similar question, said: 'The direction and dispatching of every train on an interstate railway necessarily involves knowledge in the train dispatcher of all other trains which are in the same vicinity at the same time, and also an ability to control such other trains. An interstate train from Milwaukee to Chicago cannot be safely forwarded if, under the direction of a separate employe, a local train may be moving between Milwaukee and Racine over the same track at the same time, or nearly so. The very switching at local stations must be within the knowledge and under the control of him who is to decide upon and direct the most important of interstate transportation. Obviously division of authority over these subjects would be fraught with great perils and delays to both kinds of transportation. Hardly any act of a train dispatcher on a busy railroad can be conceived which does not affect both interstate and domestic commerce. He cannot move or stop the most distinctively local train without affecting the interstate train, or vice versa. No extra or special can be put on the division without adjustment of other trains. Of course, also, every interstate train carries some purely intrastate freight or passengers. Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its possibility even is so doubtful and experimental that no Legislature would absolutely precipitate it without careful consideration nor without providing in the act for the event of failure of such experiments.' There is nothing in the *Employers' Liability Cases* to warrant the construction claimed on behalf of defendant. What the court did decide in that case was that as the act under consideration included all employes of an interstate carrier, even if they (the employes) were engaged in an employment wholly disconnected from the interstate business, citing 'employes of a purely local branch operated wholly within a state, employes in repair shops,

LAW LIBRARY  
OF  
LOS ANGELES COUNTY

construction work, accounting and clerical work, storage elevators and warehouses, not to suggest, besides, the possibility of it being engaged in other independent enterprises,' and then held that: 'As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution.' No doubt Congress, had it seen proper to do so, could have limited it to certain fellow servants, such as are employed only in interstate service or in the same or different departments of the common employment, as has been done by some of the states. See acts of Arkansas, Indiana, Massachusetts, Mississippi, Missouri, Montana, Ohio, Oregon, South Carolina, Texas, Utah, and Virginia. But the failure to do so cannot invalidate the act. In *Northern Securities Co. v. United States*, 192 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679, the contention was that the defendant was not a railroad company, that it was a corporation created by one of the states and its corporate powers limited to buying, selling, and holding stock, bonds, and other securities, and for that reason Congress had no power to regulate it; but the court held that, under the power to regulate commerce among the several states, Congress had the authority to enact the statute, and that it applied to the Securities Company. Another case in which one of the issues was very much like that now under consideration is *Loewe v. Lawlor*, 208 U. S. 274, 301, 28 Sup. Ct. 301, 52 L. Ed. 488. It was there claimed that the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, was not applicable, or, if applicable, not within the power of Congress to enact it, because the defendants were not themselves engaged in interstate commerce; but the contention was by the court overruled. The same conclusion was reached in *United States v. Debs* (C. C.) 64 Fed. 724, 745, 755, affirmed in 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. Other statutes of similar nature have been repeatedly enacted by Congress, and, when questioned, sustained. Act July 3, 1866, c. 162, 14 Stat. 81, digested as sections 5353, 5354, Rev. St. makes it a criminal offense to transport or ship, by

a carrier engaged in interstate transportation. dangerous explosives, regardless of the fact whether the shipment is interstate or intrastate, provided the carrier is at the time engaged in interstate transportation. The gravamen of the offense is to transport, or cause to be transported, any of the prohibited articles on any vessel or vehicle employed in interstate traffic. It was the passengers and employes on such vehicles or vessels whom Congress sought to protect, and under the commerce clause had the right to protect. The danger to them was as great if the explosion occurred from an intrastate shipment as an interstate. The constitutional limitation was fully met by confining the provisions of the act to vehicles employed at the time in interstate traffic. The constitutionality of this act seems never to have been questioned. In fact, the only reported case construing this act, which the court has been able to find, is *United States v. Saul* (D. C.), 58 Fed. 763. In Act Cong. December 21, 1898, c. 28, 30 Stat. 755, 763, 'An act to amend the law relating to American seamen, for the protection of such seamen, and to promote commerce,' the language used applied to all seamen, regardless of whether the vessel on which they were employed was engaged in interstate or intrastate commerce. In *Patterson v. Bark Eudora*, 190 U. S. 169, 179, 23 Sup. Ct. 821, 47 L. Ed. 1002, the constitutionality of this act was attacked upon the ground now raised and also that it applied to foreign vessels. While the court declined to determine what its decision might be in a case relating to contracts of sailors for services to be performed wholly within the state, as that question was not before it, it sustained the constitutionality of the act in an action in which the vessel was engaged in interstate commerce, and whether the vessel is foreign or not. The argument of counsel for the government, cited with approval by the court, might well be applied here: 'Moreover, as 90 per cent, of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seaman. To the average sailor



it is a consideration while in port to have his wages in part prepaid; and if, in a large port like New York, 90 per cent. of the vessels are permitted to prepay such seamen as ship upon them, and the other 10 per cent., being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to Congress and fully justified the provisions herein contained.' 190 U. S. 179, 23 Sup. Ct. 824, 47 L. Ed. 1002. It is well known that, while there may be some few railroads engaged wholly in intrastate traffic, there are practically none engaged in interstate transportation which is not also engaged in intrastate carriage of freight or passengers. To limit the liability of the railroad to its employees on a train employed in interstate traffic for injuries caused by fellow servants engaged in like employment would in many instances make the act valueless and of no benefit to the employee. In the language above quoted: 'This practical consideration, presumably, appealed to Congress and fully justified the provisions herein contained.' The safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531, amended by Act April 1, 1896, c. 87, 29 Stat. 85, amended by Act March 2, 1903, c. 976, 32 Stat. 943 make it unlawful to haul any car in interstate transportation not equipped with certain appliances deemed necessary for the safety of employees. When these statutes first came before the courts for construction, it was contended that they could only apply to carriers whose lines traverse more than one state; otherwise they would be in excess of the powers possessed by Congress. Some of the trial courts sustained this contention, but upon appeal it has been practically uniformly held that they apply to all railroads, although operating entirely within a single state, independently of all other carriers, if any interstate freight is carried on any car of the train. The test of the application of the act is held to be the transportation of any articles of interstate commerce, and, as thus construed, the act has been enforced as a constitutional exercise of the powers vested in Congress. *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321,



85 C. C. A. 27, 15 L. R. A. (N. S.) 167; *United States v. Colorado & N. W. R. Co.*, 157 Fed. 342, 85 C. C. A. 48; *United States v. Atchison, etc. Ry. Co.* (C. C. A.) 163 Fed. 517; *Chicago, etc., Ry. Co. v. United States* (C. C. A.) 165 Fed. 423; *United States v. Southern Pacific Co.* (C. C. A.) 169 Fed. 407; *Union Stock Yards Co. v. United States* (C. C. A.) 169 Fed. 404; *Belt R. Co. of Chicago v. United States* (C. C. A.) 168 Fed. 542; *Wabash R. Co. v. United States* (C. C. A.) 168 Fed. 1.

The constitutionality of the bankruptcy acts of Congress has at different times been questioned upon similar grounds, but they have been uniformly sustained. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *Nelson v. Carland*, 1 How. 265, 11 L. Ed. 126; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113. In *The Daniel Ball*, 10 Wall. 557, 566, 19 L. Ed. 999, it was claimed that the provisions of Act Cong. July 7, 1838, c. 191, 5 Stat. 304, amended by Act Aug. 30, 1852, c. 106, 9 Stat. 61, making it unlawful for any steam vessel to transport merchandise or passengers upon the navigable waters of the United States without a license, did not apply to a steamer engaged as a common carrier between places in the same state, although a portion of the merchandise transported by her is destined to places in other states; she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another state. But the court overruled this contention and held that the act applied to such cases, and that it was not an infringement on the rights of the states. Mr. Justice Field, who delivered the opinion of the court, said on that subject: 'And we answer, further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated.' While that case

was one arising on the navigable waters of the United States, it is now well settled that the power of Congress under the commerce clause is as complete upon the land. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *United States v. Colorado & N. W. R. Co.*, *supra*. It may be proper to state that this same objection was made by Messrs. Littlefield and Bannon, of the House Judiciary Committee, in their minority report on this bill, but failed to receive the approval of either House of Congress. The only reported case involving this act, which the court has been able to find, is *Fulgham v. Midland Valley R. Co. (C. C.)* 167 Fed. 660, decided by Judge Rogers of the Western district of this state; but the constitutionality of the act, it seems was not questioned, and not determined by the learned judge. In view of the conclusion reached, it is unnecessary to determine whether that question can be raised by defendant in this case, as the complaint shows on its face that the accident was caused by reason of the negligence of the conductor and locomotive engineer of the train on which plaintiff's intestate was the fireman, and which train, it is alleged, was at the time engaged in interstate transportation. Cases on that point which may be consulted are *Supervisors v. Stanley*, 105 U. S. 305, 311, 26 L. Ed. 1044; *In re Garnett*, 141 U. S. 1, 12, 11 Sup. Ct. 840, 35 L. Ed. 631; *Clark v. Kansas City*, 176 U. S. 114, 118, 20 Sup. Ct. 284, 44 L. Ed. 392; *Patterson v. Bark Eudora*, *supra*; *State of Missouri v. Dockery*, 191 U. S. 170, 24 Sup. Ct. 53, 48 L. Ed. 133; *Cooley on Const. Lim.* (7th Ed.) p. 250. In the opinion of the court the act in controversy is a valid exercise of the powers granted to Congress by the Constitution."

**§ 416. Scope of the Federal Employers' Liability Act.** The Act of Congress, commonly known as the Federal Employers' Liability Act governs the rights, duties and liabilities of common carriers by railroad to their employes for personal injuries, when the injury or death occurs while the carrier is engaged and the

injured servant is employed in interstate commerce.<sup>13</sup>  
The law also applies to common carriers by railroad

**13. United States.** *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188; *Pennsylvania R. Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902; *Hudson & M. R. Co. v. Iorio*, 152 C. C. A. 641, 239 Fed. 855.

**Alabama.** *Loveless v. Louisville & N. R. Co.*, — Ala. —, 75 So. 7; *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960; *Western Ry. of Alabama v. Mays*, — Ala. —, 72 So. 641; *Louisville & N. R. Co. v. Carter*, 195 Ala. 382, Ann. Cas. 1917E 292, 70 So. 655; *Ex Parte Atlantic Coast Line R. Co.*, 190 Ala. 132, 67 So. 256.

**Connecticut.** *Hubert v. New York, N. H. & H. R. Co.*, 90 Conn. 261, 96 Atl. 967.

**Georgia.** *Alabama Great Southern R. Co. v. Tidwell*, 145 Ga. 190, 88 S. E. 939.

**Illinois.** *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, Ann. Cas. 1916B 481, 107 N. E. 595.

**Indiana.** *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

**Kentucky.** *Louisville & N. R. Co. v. Netherton*, 175 Ky. 159, 193 S. W. 1035; *Schaeffer v. Illinois Cent. R. Co.*, 172 Ky. 337, 189 S. W. 237; *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940.

**Minnesota.** *McDonald v. Railway Transfer Co. of Minneapolis*, 121 Minn. 273, 141 N. W. 177.

**Mississippi.** *Yazoo & M. V. R. Co. v. Houston*, — Miss. —, 75 So. 690; *New Orleans, M. & C. R. Co. v. Jones*, 111 Miss. 852, 72 So. 681; *Elliott v. Illinois Cent. R. Co.*, 111 Miss. 426, 71 So. 741.

**Missouri.** *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Sells v. Atchison, T. & S. F. R. Co.*, 266 Mo. 155, 181 S. W. 106; *Miller v. Kansas City Western R. Co.*, 180 Mo. App. 371, 168 S. W. 336; *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

**Montana.** *Alexander v. Great Northern R. Co.*, 51 Mont. 565, 154 Pac. 914.

**New Jersey.** *Willever v. Delaware, L. & W. R. Co.*, 89 N. J. L. 697, 99 Atl. 321; *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764; *Hammill v. Pennsylvania R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

**New York.** *Knowles v. New York, N. H. & H. R. Co.*, 177 N. Y. App. Div. 262, 164 N. Y. Supp. 1; *Shanks v. Delaware, L. & W. R. Co.*, 214 N. Y. 413, Ann. Cas. 1916E 467, 108 N. E. 644.

**Oklahoma.** *Chicago, R. I. & P. R. Co. v. Felder*, — Okla. —, 155 Pac. 529.

**Pennsylvania.** *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461.

**Tennessee.** *Salmon v. Southern R. Co.*, 133 Tenn. 223, 180 S. W. 165.

**Vermont.** *Carpenter v. Central Vermont R. Co.*, 90 Vt. 35, 36 Atl. 373.

**West Virginia.** *McKee v. Ohio Valley Elec. R. Co.*, 78 W. Va. 131, 88 S. E. 616.



and all their employes in the territories and other possessions of the United States. Nearly all railroads in the United States are constantly engaged in interstate commerce.

Under the controlling rulings and decisions of the national Supreme Court, commencing with the *Mondou* case in 1912,<sup>14</sup> it is conservatively estimated by those in positions to know, that a majority of the railroad employes in the United States are engaged in interstate commerce so that, if injured or killed, while so employed in interstate commerce, the remedy for the injured man, if living, and, for his dependents, if dead, is to be determined and measured by this federal act.

Employes injured while engaged in intrastate commerce are still governed by the laws of the states where the accidents occur.<sup>15</sup> As to interstate employes, the

**Wisconsin.** *Jacoby v. Chicago, M. & St. P. R. Co.*, 165 Wis. 610, 161 N. W. 751, 164 N. W. 88; *Simiegil v. Great Northern R. Co.*, 165 Wis. 57, 160 N. W. 1057; *Sullivan v. Chicago, M. & St. P. R. Co.*, 163 Wis. 583, 158 N. W. 321; *Zavitovsky v. Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974; *Ruck v. Chicago, M. & St. P. R. Co.*, 153 Wis. 158, 140 N. W. 1074.

"Two things must appear before the federal statute is paramount: First, that the railroad was engaged at the time in interstate transportation; and, second, that the employee was injured while employed in interstate commerce. Thus, a yardmaster, who, at the time of his injury was handling cars for intrastate shipment, would recover, if at all, under the state statute; but if while handling cars for interstate transportation, the federal statute will control." *Chicago, R. I. & G. Ry. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

14. *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. R. 875, 38 L. R. A. (N. S.) 44.

15. **United States.** *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U. S. 43, 61 L. Ed. 583, 37 Sup. Ct. 268; *New York Cent. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 Sup. Ct. 247, 13 N. C. C. A. 943, Ann. Cas. 1917D 629; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517; *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; *Central R. Co. of New Jersey v. Paslick*, 152 C. C. A. 547, 239 Fed. 713; *Erie R. Co. v. Van Buskirk*, 143 C. C. A. 71, 228 Fed. 489; *Boyle v. Pennsylvania R. Co.*,



remedy provided by the state, is exclusive, and as to interstate employes, working for interstate railroads,

142 C. C. A. 558, 228 Fed. 266;  
Boyle v. Pennsylvania R. Co., 221  
Fed. 453; Illinois Cent. R. Co. v.  
Rogers, 136 C. C. A. 530, 221 Fed  
52.

**Alabama.** Mathews v. Alabama  
Great Southern R. Co., — Ala.  
—, 76 So. 17; Loveless v. Louis-  
ville & N. R. Co., — Ala. —,  
75 So. 7; Louisville & N. R. Co. v.  
Carter, 195 Ala. 382, Ann. Cas.  
1917E 292, 70 So. 655; Ex Parte  
Atlantic Coast Line R. Co., 190  
Ala. 132, 67 So. 256.

**Connecticut.** Vickery v. New  
London Northern R. Co., 87 Conn.  
634, 89 Atl. 277.

**Georgia.** Southern Ry. Co. v.  
v. Rhoda, — Fla. —, 74 So. 19.

**Georgia.** Southern Ry. Co. v.  
Murphy, 9 Ga. App. 190, 70 S. E.  
972.

**Illinois.** Chicago, R. I. & P. Ry.  
Co. v. Industrial Board of Illi-  
nois, 273 Ill. 528, L. R. A. 1916F  
540, 113 N. E. 80.

**Iowa.** Narey v. Minneapolis &  
St. L. R. Co., 177 Iowa 606, 159  
N. W. 230.

**Kansas.** Cole v. Atchison, T. &  
S. F. R. Co., 92 Kan. 132, 139 Pac.  
1177.

**Kentucky.** Chesapeake & O. P.  
Co. v. Harmon's Adm'r, 173 Ky.  
1, 189 S. W. 1135; Schaeffer v.  
Illinois Cent. R. Co., 172 Ky. 337,  
189 S. W. 267; Cincinnati, N. O. &  
T. P. R. Co. v. Clarke, 169 Ky. 662,  
185 S. W. 94; Cincinnati, N. O. &  
T. P. R. Co. v. Tucker, 168 Ky.  
144, 181 S. W. 940; Jones v. Ches-  
apeake & O. R. Co., 149 Ky. 566,  
149 S. W. 951.

**Massachusetts.** Corbett v. Bos-  
ton & M. R. R., 219 Mass. 351, 9  
N. C. C. A. 691, 107 N. E. 60.

**Michigan.** Fernette v. Pere  
Marquette R. Co., 175 Mich. 653,  
141 N. W. 1084, 144 N. W. 834.

**Mississippi.** Yazoo & M. V. R.  
Co. v. Houston, — Miss. —,  
75 So. 690; Illinois Cent. R. Co. v.  
Archer, 113 Miss. 158, 74 So. 135.

**New Hampshire.** Cantin v. Glen  
Junct. Transfer Co., — N. H.  
—, 96 Atl. 303.

**New York.** Hoag v. Ulster &  
D. R. Co., 177 N. Y. App. Div. 433,  
164 N. Y. Supp. 529; Knowles v.  
New York, N. H. & H. R. Co., 177  
N. Y. App. Div. 262, 164 N. Y.  
Supp. 1; Okrzesz v. Lehigh Val-  
ley R. Co., 170 N. Y. App. Div.  
15, 155 N. Y. Supp. 919; Fair-  
child v. Pennsylvania R. Co., 170  
N. Y. App. Div. 135, 155 N. Y.  
Supp. 751.

**Pennsylvania.** Hogarty v. Phil-  
adelphia & R. Ry. Co., 255 Pa. 236,  
99 Atl. 741; Hench v. Pennsyl-  
vania R. Co., 245 Pa. 1, L. R. A.  
1915D 557, Ann. Cas. 1916D 230,  
91 Atl. 1056.

**South Carolina.** Mims v. Atlan-  
tic Coast Line R. Co., 100 S. C.  
375, 85 S. E. 372.

**Texas.** Missouri, K. & T. Ry.  
Co. of Texas v. Watson, — Tex.  
Civ. App. —, 195 S. W. 1177;  
Geer v. St. Louis, S. F. & T. Ry.  
Co., — Tex. —, 194 S. W. 939;  
Missouri, K. & T. Ry. Co. of Texas  
v. Pace, — Tex. Civ. App. —,  
184 S. W. 1051; San Antonio & A.  
P. Ry. Co. v. Littleton, — Tex.  
Civ. App. —, 180 S. W. 1194;  
Houston & T. C. R. Co. v. Bright.  
— Tex. Civ. App. —, 156 S.  
W. 304; Missouri, K. & T. Ry. Co.  
of Texas v. Sadler, — Tex. Civ.  
App. —, 149 S. W. 1188; Mis-  
souri, K. & T. Ry. Co. of Texas

the remedy given by the federal statute, is exclusive, so that a practitioner representing any employe, or an employe's beneficiaries in case of death, in any action for personal injuries against a common carrier by railroad, must familiarize himself with the Federal Employers' Liability Act to determine which law, if any, furnishes a remedy for his client.

**§ 417. Purpose of Congress in Enactment of Federal Act—Uniformity and Modification of Common Law Rules.** Prior to the enactment of the Federal Employers' Liability Act of 1908 the law governing the liability of railroad companies engaged in interstate commerce to their employes for personal injuries while employed in such commerce, depended upon the statutes and decisions of the state in which the accident occurred.<sup>16</sup>

*v. Turner*, — Tex. Civ. App. —, 138 S. W. 1126; *Missouri, K. & T. R. Co. of Texas v. Hawley*, 58 Tex. Civ. App. 143, 123 S. W. 726.

**Utah.** *Grow v. Oregon Short Line R. Co.*, 47 Utah 26, 150 Pac. 970.

**Vermont.** *Castonguay v. Grand Trunk Ry. Co.*, — Vt. —, 100 Atl. 908.

**Washington.** *Killes v. Great Northern R. Co.*, 93 Wash. 416, 161 Pac. 69; *Bolch v. Chicago, M. & St. P. R. Co.*, 90 Wash. 47, 155 Pac. 422.

**West Virginia.** *Watts v. Ohio Valley Elec. R. Co.*, 78 W. Va. 144, 88 S. E. 659.

**Wisconsin.** *Great Northern R. Co. v. King*, 165 Wis. 159, 161 N. W. 371; *Sullivan v. Chicago, M. & St. P. R. Co.*, 163 Wis. 583, 158 N. W. 321; *Zavitovsky v. Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974.

16. *New York Cent. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 Sup. Ct. 247, 13 N. C. C. A. 943, Ann. Cas. 1917D 629; *Erie R.*

*Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D 138; *Taylor v. Taylor*, 232 U. S. 363, 58 L. Ed. 638, 34 Sup. Ct. 350, 6 N. C. C. A. 436; *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 57 L. Ed. 966, 33 Sup. Ct. 581; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *Missouri Pac. R. Co. v. Castle*, 224 U. S. 541, 56 L. Ed. 875, 32 Sup. Ct. 606; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. Ed. 921, 30 Sup. Ct. 676, 47 L. R. A. (N. S.) 84; *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 Sup. Ct. 136; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 107, 8 Sup. Ct. 1176; *Smith v. Industrial Accident Commission of California*, 26 Cal. App. 560, 147 Pac. 600.

In some states the fellow servant doctrine, that is, non-liability of railroads for injuries to one servant by the negligence of another, was enforced, but in others it had been abolished by statute or judicial rulings. In some jurisdictions contributory negligence was a bar to the suit, while in others the employee's negligence contributing to the injury merely reduced the damages. Assumption of risk as a defense in some states was applied with its full common law vigor; but in other jurisdictions it had been partially abolished by statute or changed by judicial legislation to a mere verbal formula without substance as a defense to negligence. Some judges had held, that contracts with employes not to sue in consideration of some form of insurance or indemnity fund, were valid, while others decided to the contrary.

"This court has repeatedly upheld the power of the State to impose upon a railway company liability to an employe engaged in train service for an injury inflicted through the negligence of another employe in the same service. *Missouri Pacific Railway Company v. Mackey*, 127 U. S. 205; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; *Tullis v. Lake Erie & W. Railway Company*, 175 U. S. 348; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209; and *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1; Obviously, the same reasons which justified a departure from the common-law rule in respect to the negligence of a fellow-servant also justify a similar departure in regard to the effect of contributory negligence, and the cases above cited in principle are therefore authoritative as to the lawfulness of the modification made by the second section of the statute under consideration of the rule

of contributory negligence as applied to railway employes. The decision in the *Mondou Case* sustaining the validity of the Federal Employers' Liability Act practically forecloses all questions as to the authority possessed by the State of Nebraska by virtue of its police power to enact the statute in question and to confine the benefits of such legislation to the employes of railroad companies; and as, at the time the plaintiff received the injuries complained of, there was no subsisting legislation by Congress affecting the liability of railway companies to their employes, under the conditions shown in this case, the State was not debarred from thus legislating for the protection of railway employes engaged in interstate commerce. See the *Mondou Case*, *supra*, and *Chicago, M. & St. P. R. R. Co. v. Solan*, 169 U. S. 133." *Missouri Pac. Ry. Co. v. Castle*, *supra*.



From this babel of judicial voices, with its consequent glaring inequities and inequalities, came the national act, declaring one rule of liability throughout the nation and with it, as a necessary concomitant, the decisions of the national courts, construing the act in all its parts, became binding upon all state courts. The fellow servant doctrine was abolished; something akin to comparative negligence was substituted for contributory negligence; assumption of risk in certain cases was abolished; contracts for a consideration of indemnity waiving the right to sue were declared void and the principle of compensation as a substitute for penalties in the way of damages which regulated recoveries in certain states, was adopted.

Congress enacted this statute so that a uniform law could apply to those engaged in interstate commerce in all the states, and so that certain common law rules determining liability might be abolished in order to protect the lives and persons of employes, by securing a more careful selection of employes, a closer supervision of them and a more rigid enforcement of their duties.<sup>17</sup> "The purpose of this bill is to change the

17. *Hulac v. Chicago & N. W. Ry. Co.*, 194 Fed. 747; *Watson v. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942; *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211; *Snead v. Central of Georgia Ry. Co.*, 151 Fed. 608; *Long v. Biddle*, 124 Ark. 127, 186 S. W. 601; *Burnett v. Atlantic Coast Line R. Co.*, 163 N. C. 186, 79 S. E. 414.

In *Watson v. St. Louis, I. M. & S. Ry. Co.*, *supra*, the court said: "The object of Congress in the enactment of the law was to protect the men employed in this hazardous occupation, in which thousands are annually killed or maimed without any fault of the master himself, but by the negligence of other employes, over whom the servant has no control, and in

whose selection he had no voice. The legislation is neither new nor revolutionary. It had been recommended by President Roosevelt in his annual message in 1905, and again in a special message on January 31, 1907. A similar act was passed by the English Parliament as early as 1880, and among the states of the Union a large number have either abolished the fellow-servant rule entirely or modified it materially in respect to employes engaged in hazardous occupations; many of them limiting the change to railroads. Among these are Alabama, Arkansas, California, Connecticut, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Mississippi, Mon-



common-law liability of employers of labor in this line of commerce, for personal injuries received by employes in the service. It abolishes the strict common-law rule of liability which bars a recovery for the personal injury or death of an employe, occasioned by the negligence of a fellow-servant. It also relaxes the common-law rule which makes contributory negligence a defense to claims for such injuries. It permits a recovery by an employe for an injury caused by the negligence of a co-employe; nor is such a recovery barred even though the injured one contributed by his own negligence to the injury. The amount of the recovery, however, is diminished in the same degree that the negligence of the injured one contributed to the injury. It makes each party responsible for his own negligence, and requires each to bear the burden thereof. The bill also provides that, to the extent that any contract, rule, or regulation seeks to exempt the employer from liability created by this act, to that extent such contract, rule or regulation shall be void. Many of the States have already changed the common-law rule in these particulars, and by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common

tana, Nebraska, Nevada, North Carolina, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Wisconsin, Virginia, and Wyoming, all of which acted on that subject long before Congress. Similar statutes have also been for a long time in force in most of the continental states of Europe. This evidences that such legislation is in compliance with the demands of an enlightened public opinion. To effect this purpose it is wholly immaterial what the employment of the fellow servant is. Public opinion, as expressed through the legislative departments of the nation, as well as many of the

States, evidently considered it an injustice that persons injured, or in case of death, the surviving members of the family, should become burdens on the public and objects of charity, and therefore considered it better public policy that the employer should be required to make some provision for them, charging the moneys thus expended to expenses of management, or cost of production, and collect it indirectly from the public. The enactment of such a statute not only results in protecting the employes of carriers by rail, but at the same time guards the public welfare by securing the safety of travelers."

carriers to their employes. Sections 1 and 2 of this bill provide that common carriers by railroad, engaged in interstate and foreign commerce, in commerce in the District of Columbia, the Territories, the Panama Canal Zone, and other possessions of the United States, shall be liable to its employes for personal injuries resulting from its negligence or by reason of any defect or insufficiency due to its negligence in its roads, equipment, or methods. It is not a new departure, but rather goes back to the old law which made the master liable for injury occasioned by the negligence of his servant, either to a co-servant or to a third person. The doctrine of fellow-servant was first enunciated in England in 1837, and since that time it has been generally followed in that country and this, except where abrogated or modified by statute. Whatever reason may have existed for the doctrine at the time it was first announced, it can not be said to exist now, under modern methods of commerce by railroad. It is possible that a century ago, under industrial methods and systems as they then existed, co-employes could have some influence over each other tending to their personal safety. It is possible that they could know something of the habits and characteristics of each other. Under present industrial methods and systems this can not be true. Then they worked with simple tools and were closely associated with each other in their work. Now they work with powerful and complex machinery, with widely diversified duties, and are distributed over larger areas and often widely separated from each other. Under present methods, personal injuries have become a prodigious burden to the employes engaged in our industrial and commercial systems. The master should be made wholly responsible for injury to the servant by reason of the negligence of a co-servant. He exercises the authority of choosing the employes and if made responsible for their acts while in line of duty he will be induced to exercise the highest degree of care in selecting competent and careful persons and will feel bound at all times to exercise over employes an authority and influence which will compel the highest degree of care

on their part for the safety of each other in the performance of their duties. These sections make the employer liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and other appliances used in the operation of railroads. Over these things the employe has absolutely no authority. The employer has complete authority over them, both in their construction and in their maintenance. It is a very hard rule, indeed, to compel men, who by the exigencies and necessities of life are bound to labor, to assume the risks and hazards of the employment, when these risks and hazards could be greatly lessened by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employe does his work. We believe that a strict rule of liability of the employer to the employe for injuries received from defective machinery will greatly lessen personal injuries on that account. The common-law rules of fellow-servants and assumption of risk still prevail in many of the States, and without any apparent good reason. In recent years many of the countries of Europe have adopted new rules of liability, which greatly relieve the harshness of the common law as it still exists in some of the States. In 1888 England passed an act which abolished the doctrine of fellow-servant with reference to the operation of railroad trains, and in 1897 it extended this law to apply to many of the hazardous employments of the country. For many years the doctrine in Germany has been yielding step by step to better rules, until for the last quarter of a century it does not apply to any of the hazardous occupations. In 1869 Austria passed a law making railroad companies liable for all injuries to their employes except where the injury was due to the victim's own negligence. The Code Napoleon made the employer answerable for all injuries received by his workmen, and this code is still in force in Belgium and Holland. Other European countries have from time to time made laws fixing the liability of the master for damages caused by the negligent act of his servant. Many of the States have passed laws modi-



fying the doctrine as changing conditions required it and justice to the employe demanded it. Alabama in 1885 eliminated the doctrine so far as it relates to railroads, and in other particulars. Arkansas in 1893 qualified the doctrine as to railroad employment. Georgia in 1856 entirely abolished the doctrine as to railroads. Iowa abolished it as to train operatives in 1862. Kansas did the same thing in 1874. The latest statute in Wisconsin on the subject abolished the fellow-servant doctrine as to employes actually engaged in operating trains. Minnesota did the same thing in 1887. Florida, Ohio, Mississippi, and Texas have changed the doctrine to the advantage of the employe. North Carolina, North Dakota, and Massachusetts have practically eliminated the doctrine as regards the operation of railroad trains. Colorado in 1901 abolished the doctrine in toto. Other States have either abolished it or modified it as regards the operation of railroads. As compared with the law now in force in other countries and in many of the States, the changes made in the law of fellow-servant by this bill are not radical. The doctrine as regards the hazardous occupations is being relegated everywhere. A Federal Statute of this character will supplant the numerous State Statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the States. It is thought that the adoption of the rule, as provided in this section, will be conducive to greater care in the operation of railroads. As it is now, where the doctrine of fellow-servant is in force, no one is responsible for the injury or death of an employe if caused by the carelessness of a co-employe. The co-servant who is guilty of negligence resulting in the injury may be liable, but as a rule he is not responsible, and hence the injury is not compensated. The employe is not held by the employer to such strict rules of caution for the safety of his co-employe, because the employer is not bound to pay the damages in case of injury. If he were held liable for damages for



every injury occasioned by the negligence of his servant, he would impose the same strict rules for the safety of his employes as he does for the safety of passengers and strangers. He will make the employment of his servant and his retention in the service dependent upon the exercise of higher care, and this will be the stronger inducement to the employe to act with a higher regard for the safety of his fellow-workmen."<sup>18</sup>

**§ 418. Defects in Act of 1908 and Amendments of 1910.** In the enforcements of the provisions of the act of 1908, the courts held that the right of action given to an injured employe did not survive to his personal representative in the event of his death;<sup>19</sup> that an

18. Report of Judiciary Committee of House of Representatives on Federal Employers' Liability Act of 1908.

19. *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 494; *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660. "But it will be observed on the other hand that the act makes no provisions for the survival of that action, so given, for an injury sustained, in the event of the death of the injured employe. \* \* \* It cannot be that legislation so much discussed in and out of Congress, and which had to be so carefully matured and drawn in order to meet the views of the courts, legislation, too, which inherently shows the skill of the lawyer evidently familiar with the settled principles of the common law which it modifies in the interest of justice and humanity, is not expressive of the will of Congress, or omits anything which Congress intended to do by it. It would have been so easy for Congress to have said, as the legislation of so many states had

previously provided, that in the event the employe injured should die from the injury his cause of action should survive to his personal representative, that it can scarcely be conceived that the provision would have been omitted had Congress so intended. But whatever Congress may have intended, it has not done so, and the courts must confine themselves to the administration of the law, and neither add to nor take from a statute where its language is clear and unambiguous. In the opinion of the court the right of action given to the injured employe by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, as at common law, perishes with the injured person. I might add that this conclusion is in harmony with the known purposes of the act, which was intended to make some provision for the unfortunate family of the deceased employe, and not to make provision for the creditors of his estate." *Fulgham v. Midland Valley R. Co.*, *supra*.

action instituted in the state court under the federal act could be removed to the proper circuit court when the required amount was involved and a diversity of citizenship existed<sup>20</sup> and that when the jurisdiction of a federal circuit court was based on the fact that the suit arose under a law of the United States, the plaintiff was compelled to sue in the district of which the defendant was an inhabitant, which, in case of a corporation, was the jurisdiction in which the charter of the defendant corporation was issued.<sup>21</sup> In addition to these decisions, the supreme court of Connecticut even held that a cause of action under the Federal Employers' Liability Act could not be prosecuted in a state court.<sup>22</sup>

The amendatory act of 1910 resulted from the decisions of the courts in these cases. The amendment to section 6 provided that any action under the act may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action, and further prescribed that the jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states, and no case arising under the act and brought in any state court of competent jurisdiction, shall be removed to any court of the United States. The second amendment provided that any right of action given by the act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

20. *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. 527. 501, 54 L. Ed. 300, 30 Sup. Ct. 184.

21. *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, 215 U. S. 22. *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 17 Ann. Cas. 324, 73 Atl. 754.

§ 419. **Congressional Purpose in the Enactment of the Amendments of 1910.** The purpose of Congress in passing the Act of 1910 was thus stated by the Judiciary Committee of the Senate in its report recommending the enactment of the amendments: "The proposed amendments to the employers' liability bill may be considered under three heads: First, as to the venue of such an action; second, as to the concurrent jurisdiction of the courts of the several States; and, third, as to the survival of the right of action. (1) As to venue. The amendment proposed as to inserting in section 6 after the words therein, 'that no such action shall be maintained under this act unless commenced within two years from the day cause of action accrued,' the following: 'Under this act an action may be brought in a circuit court of the United States, in the district of the residence of either plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of the commencement of such action.' In his special message of January 7, 1910, President Taft, after referring to a proposed amendment to give the Interstate Commerce Commission power to determine the uniform construction of all steps, ladders, hand brakes, etc., said: 'The question has arisen in the operation of the interstate commerce employers' liability act as to whether suit can be brought against the employer company in any place other than of its home office. The right to bring the suit under this act should be as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim, and process in such suit should be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws. Bills for both the foregoing purposes have been considered by the House of Representatives, and have been passed, and are now before the Interstate Commerce Committee of the Senate. I earnestly urge that they be enacted into law.' This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an in-



jured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.' This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was issued. This may be at a place in a distant State from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned. The extreme difficulty, if not impossibility, of a poor man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances. \* \* \* It is proposed to further amend the act by making the jurisdiction of the courts of the United States 'concurrent with the courts of the several States.' This is proposed in order that there shall be no excuse for courts of the States to follow in the error of the Supreme Court of Errors of Connecticut in the case of *Hoxie v. N. Y., N. H. & H. R. R. Co.* (73 Atlantic Rep. 754), in which case the court declined jurisdiction upon the ground, *inter alia*, that Congress did not intend that jurisdiction of cases arising under the act should be assumed by state courts. It is clear under the decisions of the Supreme Court of the United States that this conclusion of the Connecticut court is erroneous. And the reasons recited by the Connecticut court lead to an opposite conclusion from that which the opinion declares upon the subject. But no harm can come, and much injustice and wrong to suitors may be prevented by an express declaration that there is no intent on the part of Congress to confine remedial actions brought on the part of Congress to confine remedial actions brought under the Employers' Liability Act to the courts of the United States. In declaring that the jurisdiction of the United States courts shall be 'concurrent with the courts of the several States,' Congress is clearly within its rights and powers. \* \* \* Many of the States provide by statute for the survival of any action which the deceased may have had for the injury to his estate, and for any expenditures during his lifetime resulting from the injury. In the phraseology of the existing Employers'



Liability Act—that is, the Act of April 22, 1908—the expression used is, as to the question now under consideration: ‘Shall be liable in damages \* \* \* in case of death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe’s parents; and if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of its officers, agents, employes,’ \* \* \* . In the case of *Fulgham v. Midland Valley R. R. Company*, hereinbefore cited, the court said: ‘In the opinion of the court, right of action given to the injured employe by the act of April 22, 1908, does not survive to his personal representative in the event of his death, but, at common law, perishes with the injured person.’ \* \* \* The language of the statute should be made clear so that the uncertainty and obscurity suggested by Judge Lowell would be removed. So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear. It certainly should be as broad, as comprehensive, and as inclusive in its terms as any of the similar remedial statutes existing in any of the States, which are suspended in their operation by force of the Federal legislation upon the subject.”

**§ 420. Extent of Power Exercised by Congress in Passing the Liability Act.** A troublesome question to the practitioner will frequently arise as to whether the facts of his case create a cause of action under the federal act, or under the laws of the state, since the remedy in each realm is exclusive. Many conflicting decisions which will be reviewed later, have been handed down defining or holding when a railroad company is engaged in interstate commerce<sup>23</sup> or when a servant is employed in such commerce,<sup>24</sup> for under the federal act both must

23. Chapter 22, *infra*.

24. Chapters 23, 24, 25 and 26, *infra*.

be so engaged to render the statute applicable<sup>25</sup> and the remedy therein provided is then exclusive.

25. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109; *Ann. Cas.* 1914C 159; *Erie R. Co. v. Krysienski*, 151 C. C. A. 218, 238 Fed. 142; *Grand Trunk R. Co. of Canada v. Knapp*, 147 C. C. A. 624, 233 Fed. 950 13 N. C. C. A. 1100; *Lucchetti v. Philadelphia & R. Ry. Co.*, 233 Fed. 137; *Lombardo v. Boston & M. R. Co.*, 223 Fed. 427; *Boyle v. Pennsylvania R. Co.*, 221 Fed. 453; *Illinois Cent. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52; *Bay v. Merrill & Ring Logging Co.*, 136 C. C. A. 277, 220 Fed. 295; *Central R. Co. of New Jersey v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901.

**Alabama.** *Loveless v. Louisville & N. R. Co.*, — Ala. —, 75 So. 7; *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960; *Southern Ry. Co. v. Fisher*, — Ala. —, 74 So. 580.

**Arkansas.** *Long v. Biddle*, 124 Ark. 127, 186 S. W. 601.

**Georgia.** *Landrum v. Western & A. R. Co.*, 146 Ga. 88, 90 S. E. 710.

**Illinois.** *Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310, 106 N. E. 843.

**Indiana.** *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659; *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —, 111 N. E. 653.

**Kansas.** *Barker v. Kansas City M. & O. R. Co.*, 88 Kan. 767, 43 L. R. A. (N. S.) 1121, 129 Pac. 1151.

**Kentucky.** *Chesapeake & O. Ry. Co. v. Harmon's Adm'r*, 173 Ky. 1,

189 S. W. 1135; *Schaeffer v. Illinois Cent. R. Co.*, 172 Ky. 337, 189 S. W. 237; *Norfolk & W. Ry. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786.

**Louisiana.** *Gordon v. New Orleans Great Northern R. Co.*, 135 La. 137, 64 So. 1014.

**Minnesota.** *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005; *Lewis v. Denver & R. G. R. Co.*, 131 Minn. 122, 154 N. W. 945; *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498, 150 N. W. 165.

**Mississippi.** *New Orleans, M. & C. R. Co. v. Jones*, 111 Miss. 852, 72 So. 681.

**Missouri.** *Miller v. Kansas City Western R. Co.*, 180 Mo. App. 371, 168 S. W. 336.

**Montana.** *Alexander v. Great Northern R. Co.*, 51 Mont. 565, 154 Pac. 914.

**New York.** *Rodgers v. New York, Cent. & H. River R. Co.*, 171 N. Y. App. Div. 385, 157 N. Y. Supp. 83.

**North Carolina.** *Hinson v. Atlanta & C. Air Line R. Co.*, 172 N. C. 646, 90 S. E. 772.

**Oklahoma.** *Wichita Falls & N. W. Ry. Co. v. Puckett*, — Okla. —, 157 Pac. 112; *Atchison, T. & S. F. R. Co. v. Pitts*, 44 Okla. 604, 9 N. C. C. A. 545, 145 Pac. 1148.

**Oregon.** *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358, 146 Pac. 1097.

**Pennsylvania.** *Hogarty v. Philadelphia & R. Ry. Co.*, 245 Pa. 443, 91 Atl. 854.

In the Second Employers' Liability Cases,<sup>26</sup> the Supreme Court of the United States formulated some general rules to be applied in determining when a railroad employe is engaged in interstate commerce, but these rules, necessarily so, are vague and indefinite so that the question of when a railroad company is engaged in interstate commerce or when a servant is employed in such commerce, was necessarily left to be de-

**Texas.** *Chicago, R. I. & G. Ry. Co. v. Cosio*, — Tex. Civ. App. —, 182 S. W. 83.

**Utah.** *Grow v. Oregon Short Line R. Co.*, 44 Utah 160, Ann. Cas. 1915B 481, 138 Pac. 398.

**West Virginia.** *Watts v. Ohio Valley Elec. R. Co.*, 78 W. Va. 144, 88 S. E. 659.

**Wisconsin.** *Jacoby v. Chicago, M. & St. P. R. Co.*, 165 Wis. 610, 161 N. W. 751, 164 N. W. 88; *Gray v. Chicago & N. W. Co.*, 153 Wis. 637, 142 N. W. 505.

"Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in interstate commerce or in what is not commerce at all, that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employes, must look for redress to the laws of the State wherein the injury occurs, save where it results from the violation of some Federal statute, such as the Safety Appliance Acts." *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188.

"Three things must appear to bring a case within the Federal

Employers' Liability Act: (1) The carrier must engage in interstate commerce; (2) it must at the time of the injury in question be engaged in commerce of that character, as contradistinguished from such purely local matters as it may engage in; (3) the injured servant must also at the time of receiving his injury be engaged in interstate commerce." *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499.

"To warrant a recovery, the employer must be a railroad company engaged in interstate commerce, and the employe must be engaged in such commerce at the time of the injury. These two circumstances must exist, because the right is purely statutory, and the terms of the statute require their concurrence." *McKee v. Ohio Valley Elec. R. Co.*, 78 W. Va. 131, 88 S. E. 616.

26. 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44. The Second Employers' Liability Cases included the following cases appealed from different courts and decided by the United States Supreme Court at the same time and in one opinion in which all the judges concurred: *Mondou v. New York, N. H. & H. R. Co.*; *Northern Pac. R. Co. v. Babcock*; *New York, N. H. & H. R. Co. v. Walsh*; *Walsh v. New York, N. H. & H. R. Co.*

terminated by all the facts of each particular case, and conflicting views of courts on similar facts have been the result. These general rules as to the extent of the power of Congress in dealing with the relation of railroads and their employes while the one is engaged and the other is employed in interstate commerce, were summarized by the courts as follows: "The clauses in the Constitution (Art. 1, sec. 8, c. 3 and 18) which confer upon Congress the power 'to regulate commerce \* \* \* among the several States' and 'to make all laws which shall be necessary and proper' for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these: 1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land. 2. The phrase 'among the several States' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally. 3. 'To regulate,' in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large. 4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. 5. Among the instruments and agents to which the power extends are the rail-



roads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. 6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power."

**§ 421. Exclusiveness of the Federal Act and its Effect upon State Laws.** As to all injuries or deaths happening under the conditions prescribed in the Employers' Liability Act, i. e., while the carrier is engaged and the servant is employed in interstate commerce, the remedy given by the statute is exclusive, and all state laws in so far as they attempt to or do cover the same field, are superseded.<sup>27</sup> The statute supersedes all state

27. **United States.** *Jacobs v. Southern R. Co.*, 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588; *Texas & P. Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Seaboard Air Line Ry. Co. v. Kenney*, 240 U. S. 489, 60 L. Ed. 762, 36 Sup. Ct. 458; *Pecos & N. T. Ry. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390; *Chicago, R. I. & P. Ry. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27; *Louisville & N. R. Co. v. Rhoda*, 238 U. S. 608, 59 L. Ed. 1487, 35 Sup. Ct. 662; *Seaboard Air Line Ry. Co. v. Thornton*, 238 U. S. 606, 59 L. Ed. 1485, 35 Sup. Ct. 601; *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704; *Toledo, St. L. & W.*

*R. Co. v. Slavin*, 236 U. S. 454, 58 L. Ed. 671, 35 Sup. Ct. 306; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224, *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, 33 Sup. Ct. 703; *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman*, 150 C. C. A. 203, 237 Fed. 1; *Waters v. Guile*, 148 C. C. A. 298, 234 Fed. 532; *Grand Trunk R. Co. of Canada v. Knapp*, 147 C. C. A. 624, 233 Fed. 950, 13 N. C. C. A. 1100.

and territorial laws over the matter with which it

**Alabama.** Louisville & N. R. Co. v. Carter, 195 Ala. 382, Ann. Cas. 1917E 292, 70 So. 655; Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611; Atlantic Coast Line R. Co. v. Jones, 12 Ala. App. 419, 67 So. 632.

**Arkansas.** Chicago, R. I. & P. R. Co. v. Pearce, 118 Ark. 6, L. R. A. 1915F 551, 175 S. W. 1160.

**California.** Smithson v. Atchison, T. & S. F. R. Co., 174 Cal. 148, 162 Pac. 111.

**Colorado.** Denver & R. G. R. Co. v. Wilson, — Colo. —, 163 Pac. 857.

**Florida.** Seaboard Air Line Ry. Co. v. Hess, — Fla. —, 74 So. 500; Louisville & N. R. Co. v. Rhoda, — Fla. —, 74 So. 19; Flanders v. Georgia Southern & F. R. Co., 68 Fla. 479, 67 So. 68.

**Georgia.** Hardy v. Atlanta & W. P. R. Co., — Ga. App. —, 93 S. E. 18; Landrum v. Western & A. R. Co., 146 Ga. 88, 90 S. E. 710; Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558.

**Illinois.** Chicago Junct. R. Co. v. Industrial Board of Illinois, 277 Ill. 512, 115 N. E. 647; Devine v. Chicago, R. I. & P. Ry. Co., 266 Ill. 248, Ann. Cas. 1916B 481, 107 N. E. 595; Wagner v. Chicago & A. R. Co., 265 Ill. 245, Ann. Cas. 1916A 778, 106 N. E. 809.

**Indiana.** Grand Trunk Western Ry. Co. v. Thrift Trust Co., — Ind. App. —, 115 N. E. 685; Vandalia R. Co. v. Stringer, 182 Ind. 676, 106 N. E. 865, 107 N. E. 673. Southern R. Co. v. Hower-ton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369.

**Kansas.** Giersch v. Atchison, T. & S. F. R. Co., 98 Kan. 452, 158 Pac. 54; Cole v. Atchison, T. & S. F. R. Co., 92 Kan. 132, 139 Pac. 1177.

**Kentucky.** Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co., 172 Ky. 55, 188 S. W. 1061; McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242, 173 S. W. 765; Ill. Cent. R. Co. v. Doherty's Adm'r, 153 Ky. 363, 49 L. R. A. (N. S.) 31, 155 S. W. 1119.

**Louisiana.** Penny v. New Orleans Great Northern R. Co., 135 La. 962, 66 So. 313.

**Massachusetts.** Corbett v. Boston & M. R. R., 219 Mass. 351, 9 N. C. C. A. 691, 107 N. E. 60.

**Minnesota.** Manning v. Chicago Great Western R. Co., 135 Minn. 229, 15 N. C. C. A. 591, 160 N. W. 787.

**Mississippi.** New Orleans, M. & C. R. Co. v. Jones. 111 Miss. 852, 72 So. 681.

**Missouri.** Koukouris v. Union Pac. R. Co., 193 Mo. App. 495, 186 S. W. 545; Sells v. Atchison, T. & S. F. R. Co., 266 Mo. 155, 181 S. W. 106; Moliter v. Wabash R. Co., 180 Mo. App. 84, 168 S. W. 250; Vaughan v. St. Louis & S. F. R. Co., 177 Mo. App. 155, 164 S. W. 144; Rich v. St. Louis & S. F. R. Co., 166 Mo. App. 379, 148 S. W. 1011.

**New Hampshire.** Cantin v. Glen Junct. Transfer Co., — N. H. —, 96 Atl. 303; Shannon v. Boston & M. R. R., 77 N. H. 349, 92 Atl. 167.

**New Jersey.** Rounsaville v. Central R. Co. of New Jersey, —

deals;<sup>28</sup> for, when Congress legislates upon a particular

**N. J. L.** —, 101 Atl. 182; *West Jersey Trust Co. v. Philadelphia & R. Ry. Co.*, 88 N. J. L. 102, 95 Atl. 753; *Parker v. Atlantic City R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

**New York.** *Russell v. Erie R. Co.*, 177 N. Y. App. Div. 13, 163 N. Y. Supp. 893; *Rodgers v. New York Cent. & H. River R. Co.*, 171 N. Y. App. Div. 385, 157 N. Y. Supp. 83; *Gee v. Lehigh Valley R. Co.*, 163 N. Y. App. Div. 274, 148 N. Y. Supp. 882; *Burnett v. Erie R. Co.*, 159 N. Y. App. Div. 712, 144 N. Y. Supp. 969.

**North Dakota.** *Hein v. Great Northern R. Co.*, 34 N. D. 440, 159 N. W. 14; *Manson v. Great Northern R. Co.*, 31 N. D. 643, 155 N. W. 32.

**Oklahoma.** *Chicago, R. I. & P. Ry. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

**Oregon.** *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358, 146 Pac. 1097; *Oberlin v. Oregon-Washington R. & Nav. Co.*, 71 Ore. 177, 142 Pac. 554.

**Pennsylvania.** *Hogarty v. Philadelphia & R. D. Co.*, 255 Pa. 236, 99 Atl. 741.

**South Carolina.** *Jones v. Charleston & W. C. R. Co.*, 98 S. C. 197, 82 S. E. 415.

**Tennessee.** *Howard v. Nashville, C. & St. L. R. Co.*, 133 Tenn. 19, L. R. A. 1916B 794, Ann. Cas. 1917A 844, 179 S. W. 380.

**Texas.** *Gulf, C. & S. F. Ry. Co. v. Hall*, — Tex. Civ. App. —, 196 S. W. 613; *Ft. Worth & R. G. Ry. Co. v. Bird*, — Tex. Civ. App. —, 196 S. W. 597; *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939; *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767; *Missouri,*

*K. & T. Ry. Co. of Texas v. Moon-ey*, — Tex. Civ. App. —, 181 S. W. 543.

**Vermont.** *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925; *White's Adm'x v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618.

**West Virginia.** *Easter v. Virginian R. Co.*, 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

**Wisconsin.** *O'Connor v. Chicago, M. & St. P. R. Co.*, 163 Wis. 653, 158 N. W. 343.

The Federal act is exclusive and paramount in regulating the relations of employers and employes engaged in interstate commerce by railroad. *Carey v. Grand Trunk W. R. Co.*, — Mich. —, 166 N. W. 492.

28. **United States.** *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057, 37 Sup. Ct. 556, 14 N. C. C. A. 957; *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546, 14 N. C. C. A. 680, Ann. Cas. 1917D 1139; *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 58 L. Ed. 671, 35 Sup. Ct. 306; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; *Taylor v. Taylor*, 232 U. S. 363, 58 L. Ed. 638, 34 Sup. Ct. 350, 6 N. C. C. A. 436.

subject matter under its constitutional power to regulate commerce, state legislatures have no right to interfere by way of complementary legislation or to prescribe additional regulations covering the same field. In such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the same subject matter.<sup>29</sup> If the injury or death occurs under the circumstances defined in the act, there is no choice of remedy between a state and the federal law.<sup>30</sup>

Since the statute is exclusive, a servant, injured while employed in interstate commerce by a common carrier by railroad engaged in such commerce, must bring his action upon this statute and no other; and the same is true as to the personal representative in case of death.<sup>31</sup> State statutes upon negligence, con-

**California.** *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148, 162 Pac. 111.

**Illinois.** *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, L. R. A. 1916A 450, 109 N. E. 342.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. Clarke*, 169 Ky 662, 185 S. W. 94.

**Missouri.** *Koukouris v. Union Pac. R. Co.*, 193 Mo. App. 495, 186 S. W. 545.

**Oklahoma.** *St. Louis & S. F. R. Co. v. Snowden*, 48 Okla. 115, 149 Pac. 1083.

**Oregon.** *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358, 146 Pac. 1097.

**Texas.** *Atchison, T. & S. F. Ry. Co. v. Tack*, 61 Tex. Civ. App. 551, 130 S. W. 596.

**Washington.** *Lauer v. Northern Pac. R. Co.*, 83 Wash. 465, 145 Pac. 606.

29. *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 539, 10 L. Ed. 1060.

30. *Chicago, R. I. & P. R. Co.*

*v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224.

31. **United States.** *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176; *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603.

**Connecticut.** *Vickery v. New London Northern R. Co.*, 87 Conn. 634, 89 Atl. 277.

**Massachusetts.** *Lynch v. Boston & M. R. R.*, — Mass. —, 116 N. E. 401.

**Mississippi.** *New Orleans, M. & C. R. Co. v. Jones*, 111 Miss. 852, 72 So. 681.

**New York.** *Gee v. Lehigh Valley R. Co.*, 163 N. Y. App. Div. 274, 148 N. Y. Supp. 882.



tributory negligence, assumption of risk or who may recover in case of death, are nugatory as to all casualties happening under the conditions described in the act, that is, while both carrier and employe are engaged in interstate commerce.<sup>32</sup> "That the act is comprehensive and also exclusive," said Mr. Justice Van Devanter,<sup>33</sup> "is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, and other cases, it is pointed out that the subject which the act covers is 'the responsibility of interstate carriers by railroad to their employees injured in such commerce;' in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, it is said that 'we may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury;' that by it 'Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce,' and that it is 'paramount and exclusive;' in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256, it is held that where it appears that the injury occurred while the carrier was

32. **United States.** *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 58 L. Ed. 671, 35 Sup. Ct. 306; *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 625, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156; *De Atley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591.

**California.** *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148, 162 Pac. 111.

**Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19; *Flanders v. Georgia Southern & F. R. Co.*, 68 Fla. 479, 67 So. 68.

**Georgia.** *Landrum v. Western & A. R. Co.*, 146 Ga. 88, 90 S. E. 710.

**Massachusetts.** *Corbett v. Boston & M. R. R.*, 219 Mass. 351, 9 N. C. C. A. 691, 107 N. E. 60.

**Mississippi.** *New Orleans, M. & C. R. Co. v. Jones*, 111 Miss. 852, 72 So. 681.

**Missouri.** *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144.

**North Dakota.** *Hein v. Great Northern R. Co.*, 34 N. D. 440, 159 N. W. 14.

**Pennsylvania.** *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

**Texas.** *St. Louis Southwestern Ry. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

33. *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546, 14 N. C. C. A. 380, Ann. Cas. 1917D 1139.

engaged and the employee employed in interstate commerce, the Federal act governs to the exclusion of the state law; in *Seaboard Air Line R. Co. v. Horton*, supra, pp. 501, 503, it is said not only that Congress intended 'to exclude responsibility of the carrier to its employees' in the absence of negligence but that it is not conceivable that Congress 'intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;' and in *Wabash R. Co. v. Haynes*, 234 U. S. 86, 89, it is said: 'Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the common or statute law of the state; in other words, the Federal act would have been exclusive in its operation, not merely cumulative (citing cases). On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the state was controlling.' The act is entitled, 'An Act relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases,' and the suggestion is made that the words 'in certain cases' require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in 'commerce between any of the several states, etc. See *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463."

**§ 422. State Workmen's Compensation Laws Superseded by Federal Act as to Injuries Arising in Interstate Commerce.** The Federal Employers' Liability Act proceeds upon the principle which regards negligence as

the basis of duty to make compensation<sup>34</sup> and excludes the existence of such a duty in the absence of negligence; but Congress intended the statute to be as comprehensive in those instances in which it excludes liability as of those in which liability is imposed. It established a rule or regulation which is intended to appear uniformly in all the states as to all employes of common carriers by railroad working in interstate commerce, and, in that field, it is both paramount and exclusive. State workmen's compensation laws which provide a compensation to employes without regard to the question of the employers' default or neglect, have therefore no application to employes of common carriers by railroad killed or injured while engaged in interstate and foreign commerce, even in the absence of negligence;<sup>35</sup> for, when Congress legislates concerning a subject matter of interstate commerce, all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Under the commerce clause, Congress may regulate the liabilities of common carriers and the rights of their employes arising out of injuries sustained by the latter when both are engaged in interstate commerce. The national legislative body acted upon the subject in passing the Employers' Liability Act, and hence, awards under state compensation laws to employes of common carriers by railroad killed or injured while engaged in interstate commerce, are void.<sup>36</sup>

34. Chapter 27, *infra*.

35. *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057, 37 Sup. Ct. 556, 14 N. C. C. A. 957; *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 548, 14 N. C. C. A. 680, Ann. Cas. 1917D 1139; *Smith v. Industrial Accident Commission of California*, 26 Cal. App. 560, 147 Pac. 600; *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, L. R. A. 1916A 450, 109 N. E. 342. *Contra*: *Winfield v. Erie R. Co.*,

88 N. J. L. 619, 96 Atl. 394; *West Jersey Trust Co. v. Philadelphia & R. R. Co.*, 88 N. J. L. 102, 95 Atl. 753; *Rounsaville v. Central R. Co.*, 87 N. J. L. 371, 94 Atl. 392.

36. The widow of an employe engaged in interstate commerce is not entitled to an award under a state workmen's compensation law. *Plass v. Central New England Ry. Co.*, 221 N. Y. 472, 117 N. E. 952.

A conductor of an interstate train cannot recover compensa-

§ 423. **Common Law Right of Parents to Recover for Loss of Services of Minor Employee Injured, Superseded.** When it appears in any action by an employee against a common carrier by railroad that the injuries were sustained while the company was engaged, and while he was employed in interstate commerce, the company's responsibility is governed by the federal act and its liability can neither be extended nor abridged by common or statutory laws of any state.<sup>37</sup> A suit, therefore, by a father for the recovery for himself on account of expenses incurred for medical attention to his son and the loss of the latter's services because of an injury sustained while he was working in interstate commerce for a common carrier by railroad, cannot be sustained.<sup>38</sup> "The point in issue here, which is whether a father may maintain a suit for loss of services of his minor son occasioned by injuries received while an employee engaged by a railroad operating an interstate business, has been recently decided by the Supreme Court of the United States in the case of *New York Central & Hudson River Railroad Co. v. Tonsellito*, 244 U. S. 360, 37 Sup. Ct. 620, 61 L. Ed. 1194, decided June 4, 1917. That case originated in the state of New Jersey. The Supreme Court of that state held that the federal Employers' Liability Act did not bar the father's common-law right to sue for loss of services of a minor child. However, on the writ of error taken to the Supreme Court of the United States a majority of that tribunal held to the contrary, and reversed the

tion under a workmen's compensation law although his employer had elected to accept the provisions of the Act. *Carey v. Grand Trunk W. R. Co.*, ——— Mich. ———, 166 N. W. 492.

37. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Seaboard Air Line R. Co. v. Koennecke*, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L.

Ed. 671, 35 Sup. Ct. 306; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224.

38. *New York Cent. & H. River R. Co. v. Tonsellito*, 44 U. S. 360, 61 L. Ed. 1194, 37 Sup. Ct. 620, 14 N. C. C. A. 1072; *Flanders v. Georgia Southern & F. R. Co.*, 63 Fla. 479, 67 So. 68. *Contra: Nelson v. Illinois Cent. R. Co.*, 173 Iowa 161, 155 N. W. 169.



judgment given to the father by the New Jersey courts. It is the duty of this court to follow the federal courts on federal questions.”<sup>39</sup>

**§ 424. Remedy Provided by Statute Limited to Employees Only of Common Carriers by Railroad.** While the Federal Safety Appliance Act includes both employees and travelers on railroads within its protection when they are injured as a proximate result of a violation of that statute, the remedial provisions of the Federal Employers’ Liability Act are limited strictly to employees of a common carrier by railroad.<sup>40</sup> Congress used the word “employee” in the statute in its natural sense, and intended to describe the conventional relation of employer and employee.<sup>41</sup> An independent con-

39. *Smith v. Lusk*, — Mo. App. —, 198 S. W. 434.

40. *United States v. Oliver*, Northern Pac. Ry. Co., 196 Fed. 432.

Illinois. *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, Ann. Cas. 1916A 778, 106 N. E. 809.

Kentucky. *Louisville & N. R. Co. v. Walker’s Adm’r*, 162 Ky. 209, 172 S. W. 517.

New Jersey. *Hammill v. Pennsylvania R. Co.*, 87 N. J. L. 388, 94 Atl. 313.

New York. *Bogart v. New York Cent. & H. River R. Co.*, 171 N. Y. App. Div. 652, 157 N. Y. Supp. 420.

Oklahoma. *Missouri, K. & T. R. Co. v. West*, 38 Okla. 581, 134 Pac. 655.

Texas. *Ft. Worth Belt Ry. Co. v. Perryman*, — Tex. Civ. App. —, 158 S. W. 1181; *Missouri, K. & T. R. Co. of Texas v. Blalack*, 105 Tex. 296, 147 S. W. 559.

41. *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. Ed. 849, 35 Sup. Ct. 491, 8 N. C. C. A. 1, in which Mr. Justice Hughes, for the court, said: “For the liability

created’ by the Act is a liability to the ‘employees’ of the carrier, and not to others; and the plaintiff was not entitled to the benefit of the provision unless he was ‘employed’ by the Railroad Company within the meaning of the Act. It will be observed that the question is not whether the Railroad Company, by virtue of its duty to passengers of which it cannot divest itself by any arrangement with a sleeping car company, would not be liable for the negligence of a sleeping car porter in matters involving the passenger’s safety (*Pennsylvania Co. v. Roy*, 102 U. S. 451). Nor are we here concerned with the measure of the obligation of the Railroad Company, in the absence of special contract, to one in the plaintiff’s situation by reason of the fact that he was lawfully on the train, although not a passenger. The inquiry is whether the plaintiff comes within the statutory description, that is, whether upon the facts disclosed in the record it can be said that within

tractor, therefore, engaged in working for a common carrier by railroad even in interstate commerce has no remedy under the statute.<sup>42</sup> A signal operator working in an interlocking plant at a grade crossing of two railroad companies, was an employe of both companies within the meaning of the federal act although he was employed and paid by only one of the two carriers.<sup>42a</sup>

**§ 425. Employes on Ocean-going Ships Owned by Common Carriers by Railroads Not Included.** The federal act provides that every common carrier by railroad while engaging in interstate and foreign commerce shall be liable to any person suffering injury while he is employed by such carrier in such commerce by reason of any defect or insufficiency, due to its negligence, in its boats, wharves or other equipment; but the word "boats" in the statute refers to ships which may be properly regarded as in substance part of a railroad's extension or equipment as understood and applied in common practice.<sup>43</sup> The purpose of the statute was to prescribe a rule applicable when the parties are engaging in a business having

the sense of the Act the plaintiff was an employe of the Railroad Company, or whether he is not to be regarded as outside that description, being, in truth, on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged."

42. *Chicago, R. I. & P. R. Co. v. Bond*, 240 U. S. 449, 60 L. Ed. 735, 36 Sup. Ct. 403, 11 N. C. C. A. 342, in which the court said: "Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct and willing to assume the responsibility of direction and to be

judged by its results. This is manifest from the contract under review and from the cooperation contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences. Thus being of opinion that Turner was not an employee of the company but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

42a. *Atlantic C. L. R. Co. v. Treadway*, — Va. —, 93 S. E. 560.

43. See sec. 436, *infra*.

direct and substantial connection with railroad operations and not with any other kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto.<sup>44</sup> A longshoreman, therefore, on an ocean-going steamship, while assisting in unloading a cargo of lumber therefrom which had been transported from Galveston, Tex., to New York, had no remedy under the federal act although the ship was owned and operated by a common carrier by railroad with its principal office in the state of Kentucky.<sup>45</sup>

**§ 426. Decisions of National Courts Construing Act Control.** In construing the Federal Employers' Liability Act, the decisions of the national courts control over those of the state courts.<sup>46</sup> For example, in deter-

44. *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. 524, 14 N. C. C. A. 597, Ann. Cas. 1917D 1197.

45. *Southern Pac. Co. v. Jensen*, *supra*.

46. **United States.** *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. 567; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. 75; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27; *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252.

**Arkansas.** *Treadway v. St. Louis, I. M. & S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

**California.** *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148; 162 Pac. 111; *Southern Pac. Co. v. Pillsbury*, 170 Cal. 782, L. R. A. 1916E 916, 151 Pac. 277.

**Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19.

**Iowa.** *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa, 155, 147 N. W. 337.

**Kentucky.** *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

**Michigan.** *Bement v. Grand Rapids & I. Ry. Co.*, — Mich. —, 160 N. W. 424; *Gaines v. Grand Trunk R. Co. of Canada*, 193 Mich. 398, 159 N. W. 542; *Jorgenson v. Grand Rapids & I. R. Co.*, 189 Mich. 537, 155 N. W. 535; *Holmberg v. Lake Shore & M. S. R. Co.*, 188 Mich. 605, 155 N. W. 504.

**Minnesota.** *Manning v. Chicago Great Western R. Co.*, 135 Minn. 229, 15 N. C. C. 591, 160 N. W. 787.

**Missouri.** *Newkirk v. Pryor*, — Mo. App. —, 183 S. W. 682; *Hawkins v. St. Louis & S. F. R. Co.*, 189 Mo. App. 201, 174 S. W. 129; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

mining when a carrier is guilty of negligence under the act; when an employe assumes the risk; what proof creates a dependency in death cases within the meaning of the act; whether the doctrine of *res ipsa loquitur* applies; whether there is any evidence tending to show liability sufficient for the case to be submitted to the jury; the measure of damages and instructions thereon, are all matters upon which the decisions of the national courts control.<sup>47</sup> Where the decisions of the federal courts on a question under the act are conflicting, then a state court will follow those decisions of the national courts which appear to it to rest on the better reason.<sup>48</sup>

**Montana.** McBain v. Northern Pac. Ry. Co., — Mont. —, 160 Pac. 654.

**Nebraska.** Hadley v. Union Pac. R. Co., 99 Neb. 349, 156 N. W. 765.

**New Jersey.** Rounsaville v. Central R. of New Jersey, — N. J. L. —, 101 Atl. 182; Farrell v. Pennsylvania R. Co., 87 N. J. L. 78, 93 Atl. 682.

**Oklahoma.** Ft. Smith & W. R. Co. v. Holcombe, — Okla. —, 158 Pac. 633.

**Pennsylvania.** Mayers v. Union R. Co., — Pa. —, 100 Atl. 967; Hogarty v. Philadelphia & R. R. Co., 245 Pa. 443, 91 Atl. 854.

**Texas.** Ft. Worth & R. G. R. Co. v. Bird, — Tex. —, 196 S. W. 597.

**Vermont.** Castonguay v. Grand Trunk Ry. Co., — Vt. —, 100 Atl. 908.

**Washington.** Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47, 155 Pac. 422; Lauer v. Northern Pac. R. Co., 83 Wash. 465, 145 Pac. 606.

**Wisconsin.** Smiegl v. Great Northern R. Co., 165 Wis. 57, 160 N. W. 1057.

47. **United States.** Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1916B 475; St.

Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179; 33 Sup. Ct. 858; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176.

**Georgia.** Charleston & W. C. R. Co. v. Brown, 13 Ga. App. 744, 79 S. E. 932.

**Missouri.** McAdow v. Kansas City Western R. Co., 192 Mo. App. 540, 164 S. W. 188; Hardwick v. Wabash R. Co., 181 Mo. App. 156, 168 S. W. 328.

**Oregon.** Montgomery v. Southern Pac. Co., 64 Ore. 597, 47 L. R. A. (N. S.) 13, 131 Pac. 507.

**Washington.** Lauer v. Northern Pac. R. Co., 83 Wash. 465, 145 Pac. 606; Horton v. Oregon-Washington R. & Nav. Co., 72 Wash. 503, 47 L. R. A. (N. S.) 8, 130 Pac. 897.

Contra: on assumption of risk, Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106, 8 N. C. C. A. 538, Ann. Cas. 1916B 147, 172 S. W. 340; as to what negligence under the act, Louisville & N. R. Co. v. Johnson-Adm'x, 161 Ky. 824, 171 S. W. 847.

48. Ruck v. Chicago, M. & St. P. R. Co., 153 Wis. 158, 140 N. W. 1074.



"As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts."

§ 427. **Laws of State Control as to Procedure.** In all actions under the Federal Employers' Liability Act prosecuted in the state courts, the rules of practice and procedure are governed by the laws of the states where the cases are pending.<sup>50</sup> Thus, a state law giving an

49. *Southern Ry. Co. v. Gray*, 241, U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558.

50. **United States.** *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 60 L. Ed. 1117, 36 Sup. Ct. 630, 13 N. C. C. A. 673; *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564; *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 Sup. Ct. 595, L. R. A. 1917A 86, Ann. Cas. 1916E 505; *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. C. A. 857; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 199, 60 L. Ed. 226, 36 Sup. Ct. 75; *Kansas City Southern R. Co. v. Leslie*, 238 U. S. 599, 59 L. Ed. 1478, 35 Sup. Ct. 844; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Norfolk Southern R. Co. v. Ferabee*, 238 U. S. 269, 59 L. Ed. 1203, 35 Sup. Ct. 781; *Chicago & N. W. R. Co. v. Gray*, 237 U. S. 399, 59 L. Ed. 1018, 35 Sup. Ct. 620, 9 N. C. C. A. 452; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412.

**Alabama.** *Alabama Great Southern R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 335.

**Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 71 So. 19.

**Georgia.** *Bowers v. Southern Ry. Co.*, 10 Ga. App. 367, 73 S. E. 677.

**Iowa.** *McCullough v. Chicago R. I. & P. R. Co.*, 160 Iowa 524, 47 L. R. A. (N. S.) 23, 142 N. W. 67.

**Kentucky.** *Lexington & E. R. Co. v. Smith's Adm'r*, 172 Ky. 117, 188 S. W. 1091; *Louisville & N. R. Co. v. Holloway's Adm'r*, 163 Ky. 125, 173 S. W. 343; *Louisville & N. R. Co. v. Johnson's Adm'r*, 161 Ky. 824, 171 S. W. 847; *Chesapeake & O. R. Co. v. Kelly's Adm'r*, 161 Ky. 655, 171 S. W. 185.

**Minnesota.** *Manning v. Chicago Great Western R. Co.*, 135 Minn. 229, 15 N. C. C. A. 591, 160 N. W. 787; *Marshall v. Chicago R. I. & P. R. Co.*, 133 Minn. 460, 157 N. W. 638; *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385.

**Missouri.** *Sells v. Atchison, T. & S. F. R. Co.*, 266 Mo. 155, 181 S. W. 106; *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821; *McAdow v. Kansas City Western R. Co.*, 192 Mo. App. 540, 164 S. W. 188.

attorney a lien upon the cause of action of his client is applicable to actions prosecuted in the state courts under the federal act.<sup>50a</sup> Questions as to whether amendments shall be permitted to petitions or answers; when motions to elect should be sustained or overruled; the rules of evidence; variances; excessiveness of verdicts and similar questions of practice and procedure, are matters to be determined solely by the state courts in accordance with the statutes of the state and their rules applying the same.<sup>51</sup>

**New York.** Tyndall v. New York Cent. & H. River R. Co., 213 N. Y. 691, 107 N. E. 577.

**North Carolina.** Renn v. Seaboard Air Line R. Co., 170 N. C. 128, 86 S. E. 964; Fleming v. Norfolk Southern R. Co., 160 N. C. 196, 76 S. E. 212.

**Oklahoma.** St. Louis & S. F. R. Co. v. Brown, 45 Okla. 143, 144 Pac. 1075.

**South Carolina.** Mulligan v. Atlantic Coast Line R. Co., 104 S. C. 173, 88 S. E. 445; Howell v. Atlantic Coast Line R. Co., 99 S. C. 417, 83 S. E. 639; Bennett v. Southern Ry. Carolina Division, 98 S. C. 42, 79 S. E. 710.

**Vermont.** White's Adm'x v. Central V. Ry. Co., 87 Vt. 330, 89 Atl. 618.

**Virginia.** Going's Adm'x v. Norfolk & W. R. Co., 119 Va. 543, 89 S. E. 914; Chesapeake & O. R. Co. v. Meadows, 119 Va. 33, 13 N. C. C. A. 376, 89 S. E. 244.

**Washington.** Murker v. Northern P. Ry. Co., 95 Wash. 280, 163 Pac. 756.

**Wisconsin.** Sweet v. Chicago & N. W. R. Co., 157 Wis. 400, 147 N. W. 1054.

The rule of the federal courts as to the right of a judge to suggest what the verdict should be does not apply to a case tried in

the state court even where the cause of action is given under a federal act. Horton v. Seaboard Air Line R. Co., 169 N. C. 108, 85 S. E. 218.

50a. Dickinson v. Stiles, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 415, affirming — Minn. —, 163 N. W. 791.

51. **United States.** Illinois Cent. R. Co. v. Skaggs, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; Southern Ry.—Carolina Division v. Bennett, 233 U. S. 80, 58 L. Ed. 860, 34 Sup. Ct. 566, 10 N. C. C. A. 853; Gibson v. Bellingham & N. Ry. Co., 213 Fed. 488; Bankson v. Illinois Cent. R. Co., 196 Fed. 171.

**Arkansas.** Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, 167 S. W. 83; Midland Valley R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214.

**Georgia.** Atkinson v. Bullard, 14 Ga. App. 69, 80 S. E. 220.

**Iowa.** Armbruster v. Chicago, R. I. & P. R. Co., 166 Iowa 155, 147 N. W. 337.

**Kentucky.** Louisville & N. R. Co. v. Moore, 156 Ky. 708, 161 S. W. 1129; Louisville & N. R. Co. v. Stewart's Adm'x, 156 Ky. 550, 161 S. W. 557; Louisville & N. R.

But a substantive right or defense arising under the federal act cannot be lessened or destroyed by a rule of practice or procedure of the state courts.<sup>52</sup> For example, under the decisions of the national courts the burden of proving contributory negligence in personal injury actions by an employe against a master, is upon the defendant.<sup>53</sup> Such a rule is a matter of substance and not of procedure and the plaintiff, under the federal act, is entitled to have it enforced even in actions prosecuted in the courts of a state where the burden, in personal injury actions, of proving himself free from contributory negligence is upon the plaintiff and not upon the defendant.<sup>54</sup>

*Co. v. Strange's Adm'x*, 156 Ky. 439, 161 S. W. 239.

**Minnesota.** *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N. W. 106.

**New Hampshire.** *Tinkham v. Boston & M. R. R.*, 77 N. H. 111, 88 Atl. 709.

**North Carolina.** *Burnett v. Atlantic Coast Line R. Co.*, 163 N. C. 186, 79 S. E. 414.

**Vermont.** *Bouchard v. Central Vermont R. Co.*, 87 Vt. 399, L. R. A. 1915C 33, 89 Atl. 475.

**Wisconsin.** *Sweet v. Chicago & N. W. R. Co.*, 157 Wis. 400, 147 N. W. 1054.

State statutes requiring notice of injury not applicable under Federal Act. *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21.

52. *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. Ed. 1303, 35 Sup. Ct. 781.

53. *Seaboard Air Line Ry. Co. v. Moore*, 228 U. S. 433, 57 L. Ed. 907, 33 Sup. Ct. 580; *Washington & G. R. Co. v. Harmon*, 147 U. S. 571, 37 L. Ed. 284, 13 Sup. Ct. 557; *Inland & S. C. Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270, 11 Sup. Ct. 653; *Hough v.*

*Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Heminway v. Illinois Cent. R. Co.*, 52 C. C. A. 477, 114 Fed. 843.

54. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252, in which the court said: "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNiel v. Holbrook*, 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability. *Phillips v. Grand Trunk Ry.*, 236 U. S. 662; *Boyd v. Clark*, 8 Fed. Rep. 849; *Hollowel v. Horwick*, 14 Massachusetts, 188; *Cooper v. Lyons*, 77



§ 428. **Fellow Servant Rule Abolished as to all Interstate Employees.** The common law rule which absolved the master from liability for injuries to a servant caused by the negligence of a fellow servant, was abolished as to all interstate employees of carriers by the adoption of the Federal Employers' Liability Act; for Section 1 of the Act specifically provides that the carrier shall be liable for any injury or death resulting

Tennessee, 597 (2); *Newcombe v. Steamboat Co.*, 3 Iowa (G. Greene), 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. So, too, as to the burden of proof. As long as the question involves a mere matter of procedure as to the time when and the order in which evidence should be submitted the state court can, in those and similar instances, follow their own practice even in the trial of suits arising under the Federal law. But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those States the plaintiff is as much under the necessity of proving one of these

facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. But the United States courts have uniformly that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in States which hold that the burden is on the plaintiff. *Railroad v. Gladman*, 15 Wall. 401 (1), 407-408; *Hough v. Railway Co.*, 100 U. S. 225; *Inland etc. Co. v. Tolson*, 139 U. S. 551 (4), 557; *Washington, etc., R. R. v. Harmon*, 147 U. S. 581; *Hemingway v. Ill. Cent. R. R.*, 114 Fed. Rep. 843. Congress in passing the Federal Employers' Liability Act evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in *Sea Board Air Line v. Moore*, 228 U. S. 434. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof."



in whole or in part from the negligence of *any* of the officers, agents or employes of such carrier.<sup>75</sup>

**55. United States.** Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475; San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870; Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311; Northern Pac. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Zikos v. Oregon R. & Nav. Co., 179 Fed. 893.

**Georgia.** Bowers v. Southern R. Co., 10 Ga. App. 367, 73 So. 677.

**Illinois.** Devine v. Chicago, R. I. & P. R. Co., 266 Ill. 248, Ann. Cas. 1916B 481, 107 N. E. 595.

**Indiana.** Pittsburgh, C., C. & St. L. R. Co. v. Farmers' Trust & Savings Co., 183 Ind. 287, 108 N. E. 108; Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369.

**Kansas.** Westling v. Atchison, T. & S. R. Ry. Co., — Kan. —, 165 Pac. 669.

**Louisiana.** Lanis v. Illinois Cent. R. Co., 140 La. 1, 72 So. 788.

**Maryland.** Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225.

**Mississippi.** Elliott v. Illinois Cent. R. Co., 111 Miss. 426, 71 So. 741.

**Missouri.** Koukouris v. Union Pac. R. Co., 193 Mo. App. 495, 186 S. W. 545.

**New Hampshire.** Tapore v. Boston & M. R. R., — N. H. —, 100 Atl. 153; Caverhill v. Boston & M. R. R., 77 N. H. 330, 91 Atl. 917.

**New Jersey.** Grybowski v. Erie R. Co., 88 N. J. L. 1, 95 Atl. 764.

**North Dakota.** Manson v. Northern R. Co., 31 N. D. 643, 155 N. W. 32.

**Texas.** Carter v. Kansas City S. Ry. Co., — Tex. Civ. App. —, 155 S. W. 638.

**Vermont.** Roble v. Boston & M. R. R., — Vt. —, 100 Atl. 925.

**West Virginia.** Culp v. Virginian Ry. Co., — W. Va. —, 92 S. E. 236; Easter v. Virginian R. Co., 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

**Wisconsin.** Callahan v. Chicago & N. W. R. Co., 161 Wis. 288, 154 N. W. 449; Graber v. Duluth, S. S. & A. R. Co., 159 Wis. 414, 150 N. W. 489.

A risk which arose out of the negligence of a fellow servant was not assumed under the Federal Act. Fried v. New York, N. H. & H. R. Co., — App. Div. —, 170 N. Y. Supp. 697.

The right of action of a locomotive fireman upon an engine drawing a train engaged in interstate commerce is governed by the federal law and the fellow servant rule does not apply. Royer v. Pennsylvania R. Co., — Pa. —, 103 Atl. 276.

## CHAPTER XXII.

### COMMON CARRIERS SUBJECT TO THE LIABILITY ACT.

- Sec. 429. General Rule as to When Railroad Companies are Engaged in Interstate and Foreign Commerce.
- Sec. 430. Railroads Within the Act Defined—Spur Tracks.
- Sec. 431. Railroad Must be a Common Carrier—Tap Lines and Logging Roads.
- Sec. 432. Carriers Owning and Operating Lines Wholly Within a Single State Subject to Federal Act, When.
- Sec. 433. Railroad Carriers Engaged in Foreign Commerce Subject to the Statute.
- Sec. 434. Lessor of Railroad Engaged in Interstate Commerce Liable, When.
- Sec. 435. Interurban Electric Railroads Included Within the Act.
- Sec. 436. Railroads Carrying Passengers and no Freight.
- Sec. 437. Ships or Vessels not a Part of a Railroad System.
- Sec. 438. Street Railroads not Within the Terms of the National Act.
- Sec. 439. Receivers of Railroad Corporations Included Within the Act.
- Sec. 440. Sleeping Car Companies not Common Carriers by Railroad.
- Sec. 441. Express Companies not Common Carriers by Railroad Under Federal Act.
- Sec. 442. All Carriers by Railroad and all their Employees Within Territories Included.
- Sec. 443. Beginning and Ending of Interstate Character of Shipments.
- Sec. 444. Hauling Empty Cars or Company Property over State Line.
- Sec. 445. Transportation from Point to Point in One State Passing Through Another State in Transit.
- Sec. 446. When Reshipment from Point of Delivery Changes Interstate Character of Traffic.
- Sec. 447. When Reshipment from Point of Delivery Does Not Change Interstate Character of Traffic.
- Sec. 448. Proof that Injured Servant is Employed in Interstate Commerce Sufficient to show that the Railroad is so Engaged.

**§ 429. General Rule as to When Railroad Companies Are Engaged in Interstate and Foreign Commerce.**  
If a common carrier by railroad transports passengers, freight, express, baggage or other merchandise from one state in the United States to another, or from a state or territory to a territory or *vice versa*, or from the District of Columbia to a state or territory or *vice versa*, or from a state or territory to a foreign nation

or *vice versa*, the carrier is engaged in interstate commerce or foreign commerce within the meaning of the Federal Employers' Liability Act. Carriers engaged in foreign commerce while within the boundary of the United States are included in the act as well as carriers engaged in interstate commerce.

**§ 430. Railroads Within the Act Defined—Spur Tracks.** The Federal Employers' Liability Act is confined solely to common carriers engaged in interstate commerce by *railroad*.<sup>1</sup> The Hepburn amendment of 1906 to the Interstate Commerce Act<sup>2</sup> prescribes that a railroad, as used in that statute, shall include "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation or delivery of any of said property." It would seem that this definition following the application of analogous principles by the courts in other cases, would apply in construing what is or is not a railroad within the meaning of the liability act though the question has not apparently been directly passed upon. The Federal Circuit Court of Appeals for the sixth circuit, in 1904, construing the Safety Appliance Act decided that the Interstate Commerce Act and the Safety Appliance Act were in *pari materia* so that the definition of a railroad given in the former controlled in construing the latter.<sup>3</sup> After the passage of the Hep-

1. **United States.** *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335; *Shade v. Northern Pac. Ry. Co.*, 206 Fed. 353; *The Pawnee*, 205 Fed. 333.

**Connecticut.** *Kennerson v. Thames Towboat Co.*, 89 Conn. 367. L. R. A. 1916A 436, 94 Atl. 372.

**New Hampshire.** *Cantin v. Glen Junct. Transfer Co.*, N. H. —, 96 Atl. 303.

**New Jersey.** *Higgins v. Erie R. Co.*, 89 N. J. L. 629, 99 Atl. 98.

**Texas.** *Ft. Worth Belt Ry. Co. v. Perryman*, — Tex. Civ. App. —, 158 S. W. 1181.

2. Act June 20, 1916, c. 3591. 34 Stat. 584.

3. *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452.

burn Amendment, which defined a railroad within the meaning of the Interstate Commerce Act as quoted herein, it was held in another case that this definition of a railroad governed in construing what was a railroad under the Safety Appliance Act and the court decided that a private switch leading to a mill used by a railroad company in transporting cars in interstate commerce to and from the mill as they were consigned, with the railroad's own engines and cars constituted a "railroad" within the meaning of the Safety Appliance Act.<sup>4</sup> The national Supreme Court, in a subsequent case, held that a common carrier by railroad was liable under the Employers' Liability Act for the death of a brakeman who was killed while engaged in switching a car on a private switch running through the premises of an industrial establishment and which connected with the main line of the defendant.<sup>5</sup>

**§ 431. Railroad Must Be a Common Carrier—Tap Lines and Logging Roads.** In order to recover under the national act, the injured employe must not only show that the defendant owned or operated a railroad, but he must further show that such railroad is operated as a common carrier.<sup>6</sup> A common carrier is one who

4. *Gray v. Louisville & N. R. Co.*, 197 Fed. 874.

5. *Kanawha & M. R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174.

A laborer on a private spur track not owned by the railroad company but over which it delivered interstate shipments, was held not to be engaged in interstate commerce. *Liberti v. Staten Island Ry. Co.*, — N. Y. App. Div. —, 197 N. Y. Supp. 478. But this decision is erroneous for *Liberti* was an employee of the railroad company repairing the spur track. The mere fact that it was owned by another did not affect his interstate status.

A section foreman riding on a hand car over an interstate line to the scene of a wash-out was subject to the federal act although it later developed that the wash-out was on a private connecting spur track owned by a different corporation and not on the line of his employer. *Atlantic C. L. R. Co. v. Tomlinson*, — Ga. App. —, 94 S. E. 909.

6. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C, 153; *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Bay v.*



undertakes to transport for hire from one place to another, passengers or goods of such as choose to employ him.<sup>7</sup> A company owned a tract of timber land which it was engaged in logging and also owned a railroad on which it transported its logs from the woods to Puget Sound, eighty per cent. of the output being shipped to other states or countries. The company's articles of incorporation authorized it to do business as a common carrier; but in fact the services rendered on its road had all been private and only for the purpose of carrying the logs to the Sound. The court held that the transportation of logs did not constitute interstate commerce within the rule that a commodity is not moving in interstate commerce until it has entered on its final passage to another state or foreign country, and, hence, the company was not liable under the Federal Employers' Liability Act.<sup>8</sup>

In the Tap Line Cases, decided by the United States Supreme Court,<sup>9</sup> the question presented was whether certain logging railroads in Louisiana were common carriers by railroad or were mere "plant facilities" as that doctrine has been expounded by the Interstate Commerce Commission and the courts. The proof

Merrill & Ring Lumber Co., 211 Fed. 717; *Shade v. Northern Pac. Ry. Co.*, 206 Fed. 353; *The Pawnee*, 205 Fed. 333; *Union Stock Yards Co. of Omaha v. United States*, 94 C. C. A. 626, 169 Fed. 404; *United States v. Union Stock Yards Co. of Omaha*, 161 Fed. 919; *Ft. Worth Belt Ry. Co. v. Perryman*, — Tex. Civ. App. —, 158 S. W. 1181; *Chicago, R. I. & G. Ry. Co. v. Trout*. — Tex. Civ. App. —, 152 S. W. 1137.

7. *Nordgard v. Marysville & N. Ry. Co.*, 211 Fed. 721, *aff'd* in 134 C. C. A. 415, 218 Fed. 737, Judge, Ross dissenting on the proposition as to whether the railroad was a common carrier; 2 Words & Phrases, 1312; *Jackson Architec-*

*tural Iron Works v. Hurlbut*, 158 N. Y. 34, 70 Am. St. Rep. 432; 52 N. E. 665; *Ft. Worth Belt Ry. Co. v. Perryman*, — Tex. Civ. App. —, 158 S. W. 1181.

8. *Bay v. Merrill & Ring Logging Co.*, 243 U. S. 40, 61 L. Ed. 580, 37 Sup. Ct. 376; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 61 L. Ed. 578, 37 Sup. Ct. 374; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; *Daniel Ball Case*, 10 Wall. (U. S.) 557, 19 L. Ed. 999; *Nordgard v. Marysville & N. Ry. Co.*, 211 Fed. 721; *Bay v. Merrill & Ring Lumber Co.*, 211 Fed. 717.

9. *Atchison, T. & S. F. R. Co. v. Victoria, F. & W. R. Co.*, 234 U. S. 1, 58 L. Ed. 1185, 34 Sup. Ct. 741.

was different from that in the Bay case, *supra*, as the evidence disclosed that these roads held themselves out as common carriers to some extent though most of the traffic consisted of the logs and timbers belonging to the owners of the roads. The Supreme Court held that they were common carriers by railroad and that the extent to which a railroad is in fact used by the public does not determine whether it is a common carrier, but the right of the public to demand services of it is the criterion to determine whether the roads were plant facilities or common carriers. An order of the Interstate Commerce Commission prohibiting these tap lines from sharing in rates on commodities shipped over them on the ground that they were not common carriers, was set aside.

**§ 432. Carriers Owning and Operating Lines Wholly Within a Single State Subject to Federal Act, When.** Common carriers by railroad whose lines are wholly within the limits of a single state and who are engaged *exclusively* in intrastate commerce, are not subject to the Federal Employers' Liability Act, and hence the employes of such carriers, if injured, or if killed, their beneficiaries, must look to the law of a state for a remedy; for no power has been delegated to Congress to regulate the exclusively internal commerce of a state, this is, such traffic as is carried on by carriers entirely within the limits of a state and which does not affect or extend to other states.<sup>10</sup>

10. **United States.** Michigan Cent. R. Co. v. Michigan R. R. Commission, 236 U. S. 615, 59 L. Ed. 750, 35 Sup. Ct. 422; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. Ed. 1312, 34 Sup. Ct. 829; Grand Trunk R. Co. v. Michigan R. R. Commission, 231 U. S. 457, 58 L. Ed. 310, 34 Sup. Ct. 152; Simpson v. Shephard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; Chicago, I. & L. R. Co. v. Hackett, 228 U. S. 559, 57 L. Ed. 966, 33 Sup. Ct. 581; Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 56 L. Ed. 875, 32 Sup. Ct. 606; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; Asbell v. State, 209 U. S. 251, 52 L. Ed. 778, 28 Sup. Ct. 485, 14 Ann. Cas. 1101; Howard v. Illinois Cent. R. Co., 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141; Gulf, C. & S. F. R. Co. v. State, 204 U. S. 403, 51

But since it is well established that when a commodity has been delivered to a common carrier for con-

L. Ed. 540, 27 Sup. Ct. 360; *Mississippi R. R. Commission v. Illinois Cent. R. Co.*, 203 U. S. 335, 51 L. Ed. 209, 27 Sup. Ct. 90; *Martin v. Pittsburgh & L. E. R. Co.*, 203 U. S. 284, 51 L. Ed. 184, 27 Sup. Ct. 100, 8 Ann. Cas. 87; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. 491; *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. Ed. 325, 24 Sup. Ct. 202; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. Ed. 268, 24 Sup. Ct. 132; *Western U. Tel. Co. v. New Hope*, 187 U. S. 419, 47 L. Ed. 240, 23 Sup. Ct. 204; *Cleveland, C., C. & St. L. Ry. Co. v. People*, 177 U. S. 514, 44 L. Ed. 868, 20 Sup. Ct. 722; *Addyston Pipe & Steam Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136, 20 Sup. Ct. 96; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. 488; *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. 289; *Hennington v. State*, 163 U. S. 299, 41 L. Ed. 166, 16 Sup. Ct. 1086; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Louisville & N. R. Co. v. State*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. 714; *Geer v. State*, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. 600; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. Ed. 538, 15 Sup. Ct. 415; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. Ed. 1047, 14 Sup. Ct. 1125; *Wabash, St. L. & P. Ry. Co. v. People*, 118 U. S. 557, 30 L. Ed. 244, 7 Sup. Ct. 4;

*Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 29 L. Ed. 636, 6 Sup. Ct. 334, 388, 1191; *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 365, 27 L. Ed. 419, 2 Sup. Ct. 257; *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224; *Keokuk Northern Line Packet Co. v. City of Keokuk, Iowa*, 95 U. S. 80, 24 L. Ed. 377; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394; *Walker v. Western Transp. Co.*, 3 Wall. (U. S.) 150, 18 L. Ed. 172; *Moore v. American Transp. Co.*, 24 How. (U. S.) 1, 16 L. Ed. 674; *Sinnot v. Davenport*, 22 How. (U. S.) 227, 16 L. Ed. 243; *Smith v. Maryland*, 18 How. (U. S.) 71, 15 L. Ed. 269; *Martin v. Waddell*, 16 Pet. (U. S.) 367, 10 L. Ed. 997; *United States v. De Witt*, 9 Wall. (U. S.) 41, 19 L. Ed. 593; *License Tax Cases*, 5 Wall. (U. S.) 462, 18 L. Ed. 497.

**Alabama.** *Alabama Great Southern R. Co. v. McClesky*, 160 Ala. 630, 49 So. 433.

**Arkansas.** *Chicago, R. I. & P. Ry. Co. v. State*, 86 Ark. 412, 111 S. W. 456.

**Colorado.** *Rio Grande Southern R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986.

**Delaware.** *Winkler v. Philadelphia & R. Ry. Co.*, 4 Penn. (Del.) 80, 53 Atl. 90.

**Florida.** *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 32 L. R. A. (N. S.) 639, 47 So. 969; *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 3 L. R. A. 661, 5 So. 833.

**Georgia.** *Stephens v. Central of Georgia R. Co.*, 138 Ga. 625, 42 L.

tinuous transportation to a point in another state, interstate commerce then begins and continues

R. A. (N. S.) 541, Ann. Cas. 1913E 609, 75 S. E. 1041.

**Illinois.** *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, L. R. A. 1916A 450, 109 N. E. 342; *Luken v. Lake Shore & M. S. R. Co.*, 248 Ill. 377, 140 Am. St. Rep. 220, 21 Ann. Cas. 82, 94 N. E. 175; *People ex rel. Stead v. Chicago, I. & L. R. Co.*, 223 Ill. 581, 7 Ann. Cas. 1, 79 N. E. 144; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141, 41 Am. St. Rep. 278, 37 N. E. 247, writ of error dismissed 41 L. Ed. 1184, 17 Sup. Ct. 992 (mem. dec.).

**Indiana.** *Southern R. Co. v. Railroad Commission of Indiana* 179 Ind. 23, 100 N. E. 337; *Pittsburg, C., C. & St. L. R. Co. v. State*, 172 Ind. 147, 87 N. E. 1034; *Pittsburgh, C., C. & St. L. R. Co. v. Hartford City*, 170 Ind. 674, 20 L. R. A. (N. S.) 461, 82 N. E. 787, 85 N. E. 362; *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362; *Sears v. Warren*, 36 Ind. 267, 10 Am. Rep. 62,

**Iowa.** *State v. Chicago, M. & St. P. R. Co.*, 152 Iowa 317, 130 N. W. 802; *McGuire v. Chicago, B. & Q. R. Co.*, 131 Iowa 340, 38 L. R. A. (N. S.) 706, 108 N. W. 902; *Merchants' Transfer Co. v. Board of Review City of Des Moines*, 128 Iowa 732, 2 L. R. A. (N. S.) 662, 5 Ann. Cas. 1016, 105 N. W. 211.

**Kansas.** *Ratcliff v. Wichita Union Stockyards Co.*, 74 Kan. 1, 6 L. R. A. (N. S.) 834, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016, 86 Pac. 150.

**Massachusetts.** *Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025; *Com. v. Mulhall*, 162 Mass.

496, 44 Am. St. Rep. 387, 39 N. E. 183.

**Missouri.** *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703; *State v. Missouri Pac. R. Co.*, 242 Mo. 339, 147 S. W. 118; *State v. Missouri Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500; *Wilson v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 184.

**Montana.** *State v. Northern Pac. R. Co.*, 36 Mont. 582, 15 L. R. A. (N. S.) 134, 13 Ann. Cas. 144, 93 Pac. 945.

**New York.** *People v. Erie R. Co.*, 198 N. Y. 369, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811, 91 N. E. 849; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 682.

**Ohio.** *Detroit, T. & I. R. Co. v. State*, 82 Ohio St. 60, 137 Am. St. Rep. 758, 91 N. E. 869.

**Oklahoma.** *Chicago, R. I. & P. Ry. Co. v. State*, — Okla. —, 157 Pac. 1039; *Chicago, R. I. & P. Ry. Co. v. Bruce*, — Okla. —, 150 Pac. 880.

**Pennsylvania.** *Pennsylvania R. Co. v. Ewing*, 241 Pa. 581, 49 L. R. A. (N. S.) 977, Ann. Cas. 1915B 157, 88 Atl. 775.

**South Carolina.** *McCutchen v. Atlantic Coast Line R. Co.*, 81 S. C. 71, 61 S. E. 1108; *De Lorme v. Atlantic Coast Line R. Co.*, 79 S. C. 370, 60 S. E. 440.

**Texas.** *Galveston, H. & S. A. Ry. Co. v. J. H. Nations Meat & Supply Co.*, — Tex. Civ. App. —, 136 S. W. 833; *Wood, Hagenbarth Cattle Co. v. Galveston, H. & S. R. Ry. Co.*, — Tex. Civ. App. —, 130 S. W. 857; *Texas & P. R. Co. v. Taylor*, 103 Tex. 367, 126



throughout until the freight reaches the point where the parties intended that the movement should finally

S. W. 1117, 1200; *Texas & N. O. R. Co. v. Sabine Tram Co.*, — Tex. Civ. App. —, 121 S. W. 256; *Gulf, C. & S. F. R. Co. v. State*, 97 Tex. 274, 78 S. W. 495.

**Virginia.** *Norfolk & W. R. Co. v. Com.* 93 Va. 749, 34 L. R. A. (N. S.) 105, 15 Am. St. Rep. 827, 24 S. E. 837.

**Wisconsin.** *State v. Chicago, M. & St. P. R. Co.*, 136 Wis. 407, 19 L. R. A. (N. S.) 326, 117 N. W. 686.

"It follows that all the powers which inhere in the people of a state, and which have not been expressly granted to the United States and not prohibited to the states, still reside with the people with respect to common carriers of interstate commerce as well as to persons and companies engaged in other lines of business." *People ex rel. Chicago, I. & L. R. Co.*, 223 Ill. 581, 7 Ann. Cas. 1, 79 N. E. 144.

11. **United States.** *Chicago, K. & S. R. Co. v. Kindlespark*, 148 C. C. A. 17, 234 Fed. 1; *United States ex rel. Attorney General v. Union Stockyards & Transit Co. of Chicago*, 192 Fed. 330; *St. Joseph Stockyards Co. v. United States*, 110 C. C. A. 432, 187 Fed. 104; *United States v. Illinois Terminal R. Co.*, 168 Fed. 546; *Belt R. Co. of Chicago v. United States*, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.) 582; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305; *United States v. Northern Pac. Terminal R. Co.*, 144 Fed. 861.

**Alabama.** *Western Ry. of Alabama v. Mays*, — Ala. —, 72 So. 641.

**Illinois.** *Devine v. Chicago & C. River R. Co.*, 257 Ill. 449, 102 N. E. 803.

**Iowa.** *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499.

**Louisiana.** *Louisiana Ry. & Nav. Co. v. Holly*, 127 La. 615, 53 So. 882.

**Massachusetts.** *Morrison v. Commercial Towboat Co.*, — Mass. —, 116 N. E. 499.

**Michigan.** *Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 376, 148 N. W. 397.

**Missouri.** *Trowbridge v. Kansas City & W. B. Ry.* 192 Mo. App. 52, 179 S. W. 777.

**Texas.** *Gulf, C. & S. F. Ry. Co. v. Mathis*, — Tex. Civ. App. —, 194 S. W. 1135.

**Washington.** *Anset v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

**West Virginia.** *Findley v. Coal & Coke Co.*, 76 W. Va. 747, 87 S. E. 198.

"True, defendant's railroad, in a physical sense, was entirely within the limits of the state of Michigan, but this did not prevent defendant from connecting the road with admittedly interstate lines and so engaging in interstate commerce; in every practical sense, according to the present record, defendant had at the time in question appropriated its road as well as its yards to the transportation and handling of interstate traffic as definitely as it had of traffic of an intrastate charac-

end, such carriers, by accepting any freight for shipment to or from another state, or by participating to any extent in the movement thereof, are thereby engaged in interstate commerce, within the purview of the federal act, notwithstanding their operation may be confined within the limits of a single city, county or state.<sup>11</sup> This is true though the shipment is made by the carrier without any common control, management or arrangement with another carrier for a continuous carriage or shipment.<sup>12</sup>

The rule that a carrier engaged in transportation between points in the same state and whose lines do not extend beyond the boundaries of a single state, is under the potential control of Congress by virtue of the commerce clause when it participates in the continuous movement of commerce from one state to another even without any common arrangement or through billing with another carrier, was first definitely established by the national Supreme Court as to vessels on the navigable waters of the United States<sup>13</sup> and subsequent-

ter, and these conditions existed at the time of the accident and afterwards. When a company thus in effect dedicates such a road and the yards to a dual use—interstate and intrastate—it invests the road with the characteristics of an interstate line and subjects it to the obligations of that sort of a line. It makes it a part of the through line and becomes entitled to a part of the receipts derived from the through service.” *Chicago, K. & S. R. Co. v. Kindlesparker*, 148 C. C. A. 17, 234 Fed. 1.

“It appears, however, that by means of connections with other lines of railway more than 80 per cent of the business of the interurban line was interstate business. It received freight from connecting lines originating with-

out the state and destined to points upon the line of the defendant. The defendant railway was therefore engaged in interstate commerce.” *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499.

12. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; *United States v. Union Stockyard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *United States v. Union Stockyard & Transit Co. of Chicago*, 192 Fed. 330; *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 48, 157 Fed. 342; *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

13. *The Daniel Ball*, 10 Wall. (U. S.) 557, 19 L. Ed. 999.

ly as to carriers on land.<sup>14</sup> The court held in the *Daniel Ball* case, that a steam vessel engaged as a common carrier on Grand River exclusively between Grand Rapids and Grand Haven, Mich., in receiving and transporting goods in continuous transportation from one state to another, was engaged in commerce between the states, although the steamer did not run in connection with or in continuation of any line of vessels or railways leading to other states. In this case the court laid stress on the fact that the entire authority of Congress over interstate commerce would be successfully defeated and thwarted if several agencies, acting independently of one another but performing links in the continuous transportation of interstate freight, might, free from federal control, take up commodities at the boundary line of a state and leave them at the boundary line at the other end. "There is undoubtedly an internal commerce," said the court, "which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is con-

14. *Pennsylvania R. Co. v. Clark Bros. Coal Min. Co.*, 238 U. S. 456, 59 L. Ed. 1406, 35 Sup. Ct. 896; *Illinois Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; *Rearick v. Com.*, 203 U. S. 507, 51 L. Ed. 295, 27 Sup. Ct. 159, *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. Ed. 325, 24 Sup. Ct. 202; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. 958.



tended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

Whether a carrier operating entirely within a single state transporting articles of commerce shipped in continuous passage from places without the state to stations on its road, or from stations on its road to points without the state, free from any common control, management or arrangement with another carrier for a continuous carriage or shipment, is engaged in interstate commerce, was formerly denied<sup>15</sup> by one Federal Circuit Court of Appeals and affirmed<sup>16</sup> by another, but this controversy arose largely from a disagreement between the courts as to the construction that should be placed upon the Act to Regulate Commerce before the Hepburn amendment of 1906.<sup>17</sup> In the *Geddes* case, cited, the

15. *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452.

16. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

17. Act Feb. 4, 1887, c. 104, sec. 1, 24 Stat. 379 (3 Fed. Stat. Ann., p. 809). That definition was as

follows: "The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management or arrangement, for a continuous



court held that the phrase "common control, management or arrangement" applied to carriers wholly by railroad as well as those partly by railroad and partly by water. In the other case, cited, it was held that the phrase quoted only applied to carriers partly by railroad and partly by water. Which of these two courts was correct in interpreting the Interstate Commerce Act as it then read, need not concern a lawyer bringing a suit under the Federal Employers' Liability Act for the reason that the Interstate Commerce Act was amended in 1906 so that the clause "under a common control, management or arrangement" now qualifies carriers partly by railroad and partly by water and has no application to carriers wholly by railroad.<sup>18</sup>

§ 433. **Railroad Carriers Engaged in Foreign Commerce Subject to the Statute.** The provisions of the national Employers' Liability Act apply not only to carriers by railroad engaged in commerce between the states, but also to carriers by railroad engaged in commerce between the states or territories and foreign nation or nations. From the language of the statute, therefore, it necessarily follows that any common carrier by railroad engaged in transporting property from any point in the United States to Canada and to Mexico, and *vice versa*, is subject to the act.

A carrier engaged in transporting property from a point in a state to a port in the same state for transshipment to a foreign country is engaged in foreign commerce within the statute although its line may be confined within the boundary of that state. For example, a shipment from a point in Louisiana to New Orleans, La., by rail for export constitutes foreign commerce and not intrastate commerce, so that railroad employes engaged in such work are within the federal act. The

carriage or shipment from one state or territory of the United States, or the District of Columbia, to another state or territory of the United States, or the District of Columbia."

18. Act of June 29, 1906 c. 3591, sec. 1 and sec. 11, 34 Stat. 584, 595 (Fed. Stat. Ann. 1909 Supp., p. 255). See section 90, *supra*.

phrase "engaging in commerce between any of the states or territories and any foreign nation or nations," found in the first section of the Employers' Liability Act, has been assigned a definite meaning by the national courts in construing other statutes containing similar terms.<sup>19</sup>

§ 434. **Lessor of Railroad Engaged in Interstate Commerce Liable, When.** If, under the laws of the state, the lessor of a railroad remains responsible for the acts of the lessee as the statutes of several of the states provide, a railroad company which leases its entire line to another railroad company doing an interstate business, creates the lessee its agent and the lessor is a common carrier by railroad engaging in interstate commerce, and the federal act controls as to its liability for injuries to employes of the lessee engaged in interstate commerce. This is true even though the railroad leased is confined within the boundaries of one state. Both such companies, while the lessee is engaged in interstate commerce, are within the terms of the national statute.<sup>20</sup> In the Zachary case, cited, the deceased locomotive fireman was an employe of the Southern Railway Company, the lessee of the defendant in the case. The lessor's activity in the operation of the railroad was confined solely to receiving annual rents from the Southern Railway Company and distributing them among its stockholders. The state law of North Carolina provided that the lessor of a railroad, notwithstanding the lease, was liable for all of the lessee's acts of commission and omission in operating the road, although the lessor was not actually engaged in either.

Construing such leases under the Federal Employers' Liability Act, the court said: "It is plain enough,

19. See section 4, *supra*.

20. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; Erie R. Co. v. Krysienski, 151 C. C. A. 218, 238 Fed. 142; Nordgard v. Marys-

ville & N. Ry. Co., 211 Fed. 721; Copper River & N. W. R. Co. v. Heney, 128 C. C. A. 131, 211 Fed. 459; Campbell v. Canadian Northern R. Co., 124 Minn. 245, 144 N. W. 772.

however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employes as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between the states,' and that the deceased was 'employed by such carrier in such commerce,' within the meaning of the federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed." But the Supreme Court of Illinois held, in a case decided ten months after the opinion in the Zachary case was delivered, that under the federal act the owner of a railroad track was not liable to an employe of a licensee of the same track, both being engaged in interstate commerce, for the reason that the relation of master and servant did not exist between the employe of the licensee and the owner of the track.<sup>21</sup> In the Wagner case, A, a railroad company and the defendant in the case, owned a Y-track which was a part of its tracks on a certain street in Chicago. This Y-track ran north-east and connected at one end with the tracks belonging to B and at the other end with tracks belonging to C. Alongside of the Y-track and on A's property was a semaphore post 16 feet high which, however, was erected by and belonged to C. The plaintiff, a con-

21. *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, Ann. Cas. 1916A 778, 106 N. E. 809. All of the

judges in this case concurred in the ruling, but two judges dissented on another point.



ductor in charge of a switching crew, was an employe of D. At the time of his injury he was assisting in the movement of interstate cars and was hanging on the side of a car on the Y-track when, owing to its close proximity, he was struck by the semaphore post and was severely injured. D company used the Y-track and had been using it for several years to transfer its cars and to make deliveries to other companies. The track was used by D with the consent of A and nearly every month D had received a bill from A for the use of this track and regularly paid the same. The semaphore post had been in the same place for several years. While on A's property and close to the Y-track on which plaintiff was injured, the post was not maintained or controlled by A or D but by C whose tracks connected with the Y-track at one end. Although the semaphore was not erected or maintained by it, the court held that A was liable if it permitted it to negligently remain there; that A and D were joint tort-feasors and that A was negligent in permitting the operation of trains by its licensee D over the track. On the question of A's liability, being the sole defendant, under the Federal Employers' Liability Act, to the plaintiff, the employe of D, the court said: "Defendant in error had no cause of action against plaintiff in error under the Federal Employers' Liability Act, as that act applies only where the relation of master and servant exists."

**§ 435. Interurban Electric Railroads Included Within the Act.** Interurban electric railroad companies carrying passengers, express or freight from one state to another are common carriers within the terms of the Federal Employers' Liability Act.<sup>22</sup> An inter-

22. *Washington Ry. & Elec. Co. v. Scala*, 244 U. S. 630, 61 L. Ed. 1360, 37 Sup. Ct. 654; *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; *Spokane & I. E. R. Co. v. United States*, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. 668; *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. 252, 11 N. C. C. A. 857; *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 230 U. S.



urban electric railway company operating a line from a point in Kansas to a point in Missouri, was engaged in interstate commerce although after reaching Kansas City, Kansas, and then into Kansas City, Missouri, a street car company furnished the electric power and the conductor, and the interurban company, the motorman, and the cars were run over the tracks of the street railway company.<sup>23</sup> "It is clear," said Mr. Justice Clark of the national Supreme Court, in holding that an interurban electric railroad was within the act,<sup>24</sup> "that the defendant was incorporated as, and at the time of the accident complained of was, a railway company, not a street railway company; that it had full powers of eminent domain; that at the time of the accident complained of it owned and operated a line of electric railway extending from a terminus within the District of Columbia to a terminus at Cabin John Creek, in the State of Maryland, a large part of the line being constructed on a private right of way, and that it was at that time a common carrier of passengers for hire between its termini. It is argued that under the decision in *Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission*, 230 U. S. 324, the railway of the defendant was a street railroad and that therefore the

324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 46 L. R. A. (N. S.) 385; *United States v. Baltimore & O. S. W. R. Co.*, 226 U. S. 14, 57 L. Ed. 104, 33 Sup. Ct. 5, *Southern Pac. Co. v. Industrial Accident Commission of California*, 174 Cal. 19, 161 Pac. 1143; *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499; *Washington, B. & A. Elec. Co. v. Owens*, — Md. —, 101 Atl. 532.

*McKee v. Ohio Valley Elec. R. Co.*, 78 W. Va. 131, 88 S. E. 616, in which the court held that an interurban electric railway extending from the city of Huntington, W. Va. to Ashland, Ky., was a

common carrier by railroad within the statute. To the same effect: *Watts v. Ohio Valley Elec. R. Co.*, 78 W. Va. 144, 88 S. E. 659.

23. *McAdow v. Kansas City Western R. Co.*, 192 Mo. App. 540, 164, S. W. 188.

An interurban electric railroad receiving packages for shipment to another state is a carrier within the federal act although it handles no cars into or out of the state. *Cholerton v. Detroit, J. & C. Ry. Co.*, — Mich. —, 165 N. W. 606.

24. *Washington Ry. & Elec. Co. v. Scala*, 244 U. S. 630, 61 L. Ed. 1360, 37 Sup. Ct. 654.

defendant was not a 'common carrier by railroad' within the terms of the Act of 1908 as amended. That case dealt with a purely street railway in the streets of two cities, and the decision was that it was not a 'railroad' such as was intended to be placed under the jurisdiction of the Interstate Commerce Commission by the Interstate Commerce Act of 1887. The case is of negligible value in determining either the construction of the act we are considering in this case, or the classification of the defendant, which clearly enough is a suburban railroad common carrier of passengers within the scope of the Federal Employers' Liability Act."

**§ 436. Railroads Carrying Passengers and no Freight.** Although a common carrier by railroad carries only passengers from one state to another and handles no freight, it is nevertheless engaged in interstate commerce within the terms of the federal act.<sup>25</sup>

**§ 437. Ships or Vessels not a Part of a Railroad System.** While the first section of the Act of 1908 includes a railroad company's boats used in interstate commerce and makes it liable for defects or insufficiencies in such boats, due to negligence, causing injuries to its employes while employed in such commerce, yet the federal statute does not apply to a vessel not a part of a railroad system.<sup>26</sup> On the other hand, a ferry-boat used by a railroad company in the transportation of freight and passengers from Jersey City across the river to New York state, is used in interstate commerce within the meaning of the federal statute.<sup>27</sup> In the last case cited the court also held that the Federal Employers' Liability Act did not, by implication, repeal the federal statutory provision permitting shipowners to

25. *Washington Ry. & Elec. Co. v. Scala*, 244 U. S. 620, 61 L. Ed. 1360, 37 Sup. Ct. 654; *Washington R. Co. v. Downey*, 40 App. Cas. (D. C.) 147.

26. *The Pawnee*, 205 Fed. 333. See Section 425, *supra*.

27. *The Passaic*, 190 Fed. 644, *aff'd* in 122 C. C. A. 466, 204 Fed. 266; *Wilcznski v. Pennsylvania R. Co.*, — N. J. L. —, 100 Atl. 226.

limit the liability as applied to actions for injuries to employes on a vessel operated by a railroad company as a part of its interstate line.<sup>28</sup>

**§ 438. Street Railroads not Within the Terms of the National Act.** Street railways which transport passengers or freight across state lines or from one state to another, are not included within the terms of the act, for the statute mentions only common carriers "by railroad" and the United States Supreme Court has defined the term "railroad" by interpretation as not including street railroads.<sup>29</sup> The same conclusion was reached by the Kansas City Court of Appeals in a case brought under the Federal Employers' Liability Act.<sup>30</sup> In the case cited before the United States Supreme Court, counsel for appellant cited decisions from twelve states, holding that in a statute the word "railroad" did not mean "street railroads" and the counsel for defendant cited decisions to the contrary from an equal number of states. A similar disagreement was shown in the briefs in federal tribunals. Speaking of this conflict among the decisions of the various courts, Justice Lamar, speaking for the court, said: "This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word 'railroad' includes street railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that 'railroad' does not include street railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, 'a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a

28. Section 4283 R. S. (4 Fed. Stat. Ann., p. 839).

29. *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 230 U. S. 324, 57 L. Ed. 1501, 33 Sup. Ct. 890, 46 L. R. A. (N.

S.) 385, rev'g 191 Fed. 40, 179 Fed. 243.

30. *McAdow v. Kansas City Western R. Co.*, 192 Mo. App. 540, 164 S. W. 188.

street is from a road.' Louisville & Portland R. Co. v. Louisville City R. Co., 2 Duvall 175. But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce."

**§ 439. Receivers of Railroad Corporations Included Within the Act.** It is provided in section 7 of the federal act that the term "common carrier" in the first section of the act shall include the receiver or receivers or other persons or corporations charged with the management and operation of the business of a common carrier. Courts have both affirmed<sup>31</sup> and denied<sup>32</sup> the proposition that it is necessary for the plaintiff to show by proof that the receiver has been duly appointed, is in charge of and has authority to operate the railroad. In view of this conflict the "safety first" propaganda as applied to legal procedure would seem to suggest to the careful practitioner, if representing the plaintiff, that he obtain a certified copy of the receiver's appointment and authority and offer it in evidence.

**§ 440. Sleeping Car Companies not Common Carriers by Railroad.** A sleeping car company furnishing

31. *Hudkins v. Bush*, 69 W. Va. 194, 71 S. E. 106, Ann. Cas. 1913A 533.

32. *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362, 24 N. E. 452, aff'g 32 Ill. App. 86,



sleeping cars under a contract with a railroad company to be used by the common carrier does not thereby assume or acquire the status of a common carrier by railroad although it may be engaged in interstate commerce.<sup>33</sup> Employees of such companies are not therefore, within the purview of the Federal Employers' Liability Act. If, however, a person is employed jointly by a sleeping car company and a railroad company, he is under the Federal Act in so far as the liability of railroad companies is concerned, if injured while engaged in interstate commerce.<sup>34</sup>

§ 441. **Express Companies not Common Carriers by Railroad Under Federal Act.** Express companies receiving, transporting and delivering articles of merchandise for hire in facilities provided therefor by railroad companies are not common carriers by railroad within the meaning of the Employers' Liability Act.<sup>35</sup> A similar conclusion was reached as to the status of express companies under the Interstate Commerce Act prior to the amendment of 1906 specifically including express companies.<sup>36</sup> Such companies are common carriers of freight

aff'd 141 U. S. 327, 35 L. Ed. 796, 12 Sup. Ct. 11; McNulta v. Ensich, 134 Ill. 46, 24 N. E. 631, rev'g 31 Ill. App. 100.

33. Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 59 L. Ed. 849, 35 Sup. Ct. 491, 8 N. C. C. A. 1; Martin v. New York, N. H. & H. R. Co., 241 Fed. 696; Pullman Co. v. Linke, 203 Fed. 1017; McDermon v. Southern Pac. Co., 122 Fed. 669; Lemon v. Pullman Palace Car Co., 52 Fed. 262; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, rev'g 114 Ill. App. 141.

34. See Section 424, *supra*.

35. Higgins v. Erie R. Co., 89 N. J. L. 629, 99 Atl. 98. See Section 522, *infra*.

In Taylor v. Wells, Fargo & Co., — C. C. A. —, 249 Fed. 109, the Federal Circuit Court of Appeals for the Fifth Circuit held that an express company was a common carrier *by railroad* within the provisions of the Federal Employers' Liability Act. But a writ of certiorari was granted by the Supreme Court and this cause was pending in that court at the time of the publication of this work.

36. United States v. Morsman, 42 Fed. 448.

"The interstate commerce act has, so far as express companies not operating railway lines are concerned, wrought no change of the common law in this regard. At an early day the question was

but not "by railroad" although they use the facilities and cars furnished by railroad companies. In the case of *Chapman v. United States Express Company*,<sup>37</sup> the defendant's counsel admitted that the federal act controlled the liability of the company.

§ 442. **All Carriers by Railroad and all their Employes Within Territories Included.** As Congress has full and complete power over territories and other possessions of the United States, section 2 of the federal act, which applies to all common carriers by railroad and all their employes in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States is valid.<sup>38</sup> Although the act of 1906 was declared invalid as to carriers engaged in interstate and foreign commerce, even that law as to *all* carriers and *all* their employes in territories and other possessions of the United States, was declared valid.<sup>39</sup> However, by section 2, supra, of the act of 1908

raised whether express companies were subject to the provisions of the Interstate Commerce Act, and, after full argument and deliberate consideration, the interstate commerce commission unanimously decided that the act did not apply to express companies properly so termed; that is to say, to independent organizations that carried on an express or parcel business in the usual manner, and which did not operate railway lines." *Southern Indiana Exp. Co. v. United States Exp. Co.*, 88 Fed. 659.

37. 192 Mich. 654, 159 N. W. 308.

38. *Santa Fe Cent. R. Co. v. Friday*, 232 U. S. 694, 58 L. Ed. 802, 34 Sup. Ct. 468; *American R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. 224; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603, 56

L. Ed. 911, 32 Sup. Ct. 589, 1 N. C. C. A. 892; *American R. Co. of Porto Rico v. Birch*, 224 U. S. 547, 56 L. Ed. 879, 32 Sup. Ct. 603; *El Paso & N. E. R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. Ed. 106, 30 Sup. Ct. 21; *Cound v. Atchison, T. & S. F. Ry. Co.*, 173 Fed. 527; *Friday v. Santa Fe Cent. R. Co.*, 16 N. M. 434, 120 Pac. 316; *Atchison, T. & S. F. Ry. Co. v. Tack*, 61 Tex. Civ. App. 551, 130 S. W. 596; *Atchison, T. & S. F. Ry. Co. v. Pickens*, (Tex. Civ. App.), 118 S. W. 1133; *Atchison, T. & S. F. Ry. Co. v. Mills*, 49 Tex. Civ. App. 349, 108 S. W. 480.

39. *Washington, A. & Mt. V. R. Co. v. Downey*, 236 U. S. 190, 59 L. Ed. 533, 35 Sup. Ct. 406, in which the court said: "The law here involved, as we have said, is the Employers' Liability Act of 1906. Undoubtedly that law as enacted was in form one of general ap-

which regulates only carriers by *railroad* in territories and other possessions of the United States, the act of

plication, but it was held to be unconstitutional as such a law in *The Employers' Liability Cases*, 207 U. S. 463. Notwithstanding that ruling, however, the provisions of the Statute, so far as they apply to the District of Columbia, have been decided to be within the power of Congress to enact because of its plenary authority as the local legislature of the District, and because the intention to make the provisions of the law applicable to the District locally was manifest and separable from the purpose to enact a statute which would be applicable generally throughout the United States. *El Paso & N. E. Ry. v. Gutierrez*, 215 U. S. 87, 97-98; *Philadelphia, Balt. & Wash. R. R. v. Schubert*, 224 U. S. 603, 610; *Santa Fe Central Ry. v. Friday*, 232 U. S. 694, 698; and see *Butts v. Merchants Transportation Co.*, 230 U. S. 126, 137. Under this condition there is no ground to maintain the proposition that the statute as applicable to the District of Columbia was adopted as one of a general charter, and that therefore we have power to review the questions involved. But it is said, the trolley cars were in transit from the State of Virginia to the District and therefore were engaged in a movement from State to Territory not purely local in its character and hence there is jurisdiction. But this rests upon the mistaken assumption that the test of jurisdiction is the character of the act to which the statute applies, and not the nature of the statute itself, that is, whether it is general or local to the District.

And this difficulty is not answered by the argument that because the statute was made controlling concerning acts not purely local, therefore as the effect cannot be greater than the cause, the statute must itself be said to be for the purposes of jurisdiction not of a local character. But again the proposition rests upon an erroneous assumption. The test of whether the statute is general or local depends not upon the particular question to which it may be exceptionally applied in a given case, but upon the exertion of legislative power which the statute manifests and its general operation, that is to say, whether it was enacted as a statute of general application under the general legislative power or whether it took being as the result of the exercise of the purely local power of Congress to govern the District of Columbia, and was as a general rule intended to be so applicable. The error of the argument could not be better illustrated than by saying that if the proposition were admitted, it would necessitate deciding that a statute which has been held to be beyond the constitutional power of Congress to enact so far as it embodied anything but the exertion of local power may yet be enforced and applied as a general statute. The want of foundation for the contention is besides made plainer by looking at the subject from another point of view. While the transit in which the train was engaged was not purely local, the accident complained of occurred within the confines of the District



1906 was repealed. But it was specifically provided in section 8 of the act of 1908 that "nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An act relating to liability of common carriers in the District of Columbia, and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees,' approved June eleventh, nineteen hundred and six."

**§ 443. Beginning and Ending of Interstate Character of Shipments.** The phrase "engaging in commerce" between the several states, as used in the first section of the Federal Employers' Liability Act, has a well-defined meaning under the decisions of the national courts as the same term has been frequently construed in interpreting other federal statutes passed pursuant to the power of Congress under the commerce clause. When applied to transportation by railroad, to which the Employers' Liability Act is limited, commerce between the several states is not to be determined by the billing or contract but by the actual movement and character of the traffic.<sup>40</sup> There must be a point of time when traffic intended for shipment to another state, ceases to be governed exclusively by the law of the state and begins to be governed by the federal law.

The transportation of a commodity from one state to another does not commence until it has been actual-

of Columbia and the statute became applicable concerning it because as a local statute it governed in the absence of legislation by Congress of a general character governing the subject."

40. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641; *Railroad Commission of Louisiana v. Texas & P. R. Co.*,

229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703.

"It is the nature of the service performed by the carrier, and not the way in which goods are billed, that determines whether carriage is interstate or not."—*Trimble, J.*, in *Trowbridge v. Kansas City & W. B. Ry.* 192 Mo. App. 52, 179 S. W. 777.



ly launched on its way to another state or has been committed to a common carrier for transportation to such state.<sup>41</sup> From the moment, therefore, that a shipment for a point in another state is accepted by a common carrier, that carrier is engaged in interstate commerce during the entire period from the time of acceptance at the point of origin until the shipment is finally delivered to and accepted by the consignee at the point of destination;<sup>42</sup> for traffic which, by reason of

41. *Bay v. Merrill & Ring Logging Co.*, 243 U. S. 40, 61 L. Ed. 580, 37 Sup. Ct. 376; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 61 L. Ed. 578, 37 Sup. Ct. 374; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475.

42. *United States. Kanawha & M. R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; *Pennsylvania R. Co. v. Mitchell Coal & Coke Co.*, 238 U. S. 251, 59 L. Ed. 1293, 35 Sup. Ct. 787; *Illinois Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *United States v. Pere Marquette R. Co.*, 211 Fed. 220; *Jewel Tea Co. v. Lee's Summit*, Missouri, 198 Fed. 532; *Belt R. Co. of Chicago v. United States*, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.) 582.

*Arizona. Southern Pac. Co. v. State*, — Ariz., —, 165 Pac. 303.

*Illinois. Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201; *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449, 102 N. E. 803.

*Kansas. Easdale v. Atchison, T. & S. F. R. Co.*, 100 Kan. 305, 164 Pac. 164.

*Kentucky. Louisville & N. R. Co. v. Meadors' Adm'r*, 176 Ky. 765, 197 S. W. 440.

*Minnesota. Breske v. Minneapolis & S. L. R. Co.*, 115 Minn. 386, 132 N. W. 337.

*Missouri. Collier v. Wabash R. Co.*, — Mo. App. —, 190 S. W. 969; *Reynolds v. St. Louis Southwestern Ry. Co.*, — Mo. App. —, 190 S. W. 423; *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Werner Saw Mill Co. v. Kansas City Southern R. Co.*, 194 Mo. App. 618; 186 S. W. 118; *Lusk v. Atkinson*, 268 Mo. 109, 186 S. W. 703.

*New Jersey. Moran v. Central R. Co. of New Jersey*, 88 N. J. L. 730, 96 Atl. 1023.

*New York. Whalen v. New Cent. & H. River R. Co.*, 173 N. Y. App. Div. 268, 159 N. Y. Supp. 244; *Parsons v. Delaware, & H. Co.*, 167 N. Y. App. Div. 536, 153 N. Y. Supp. 179.

*Vermont. Lynch's Adm'r v. Central Vermont R. Co.*, 89 Vt. 363, 95 Atl. 683.

its origin and destination, is interstate, does not lose its distinctive character as such when taken up and carried forward by a state carrier to a destination in the state in which such carrier operates or when so carried to be delivered to another carrier in the same state for further transportation within the state. The fact that several different and independent agencies are employed in transporting a commodity, some acting entirely in one state and some acting through two or more states, does, in no respect, affect the character of the transportation.<sup>43</sup>

When freight is delivered to and accepted by a carrier for transportation to another state, it becomes a part of interstate commerce. The interstate character thus acquired continues, at least, until the load reaches the point where the parties originally intended that the movement should finally end.<sup>44</sup> The Employers' Liability Act is not, therefore, limited to the actual transportation itself, but as acceptance and delivery of freight is a part of interstate transportation, the statute covers the handling and the delivery of interstate traffic by common carriers at terminal points.<sup>45</sup>

43. *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. Ed. 325, 24 Sup. Ct. 202; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. 700; *Harman v. City of Chicago*, 147 U. S. 396, 37 L. Ed. 216, 13 Sup. Ct. 306; *The Daniel Ball*, 10 Wall. (N. S.) 557, 19 L. Ed. 999; *Corcoran v. Louisville & N. R. Co.*, 125 Ky. 634, 101 S. W. 1185; *St. Louis Southwestern R. Co. of Texas v. Arkansas & T. Grain Co.*, 42 Tex. Civ. App. 125, 95 S. W. 656; *Texas & P. Ry. Co. v. Davis*, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562; *Houston Direct Nav. Co. v. Insurance Co. of North America*, 89 Tex. 1, 30 L. R. A. 713, 59 Am. St. Rep. 17, 32 S. W. 889.

44. *Illinois Cent. R. Co. v. De Fuentes*, 236 U. S. 157, 59 L. Ed. 517, 35 Sup. Ct. 275; *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653.

45. *Jacobs v. Southern R. Co.*, 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588; *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390; *Southern R. Co. v. Lloyd*, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. Ed.

§ 444. **Hauling Empty Cars or Company Property over State Line.** A common carrier by railroad while transporting empty cars, or cars containing only property owned by the railroad company, from one state to another, is engaged in interstate commerce within the meaning of the national statute.<sup>46</sup> But after an interstate journey of empty cars has come to an end by a delivery at the intended destination point in another state, a subsequent new and independent movement between two points in the same state does not constitute

1319, 34 Sup. Ct. 814; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156; *Seaboard Air Line Ry. Co. v. Moore*, 228 U. S. 433, 57 L. Ed. 907, 33 Sup. Ct. 580; *Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *United States v. Union Stockyard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. Ed. 112, 30 Sup. Ct. 66; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320, 46 L. Ed. 1182, 22 Sup. Ct. 824; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. Ed. 287, 8 Sup. Ct. 266.

46. *United States. Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct.

185; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *St. Joseph & G. I. R. Co. v. United States*, 146 C. C. A. 397, 232 Fed. 349; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *United States v. Chicago & N. W. Ry. Co.*, 157 Fed. 616; *United States v. St. Louis, I. M. & S. R. Co.*, 154 Fed. 516; *United States v. Chicago, M. & St. P. Ry. Co.*, 149 Fed. 486; *Voelker v. Chicago, M. & St. P. Ry. Co.*, 116 Fed. 867.

**Alabama.** *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

**Arkansas.** *St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834; *St. Louis & S. F. R. Co. v. Conarty*, 106 Ark. 421, 155 S. W. 93; *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

**Indiana.** *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

**Iowa.** *Bruckshaw v. Chicago, R. I. & P. R. Co.*, 173 Iowa 207, 155 N. W. 273.

**Kansas.** *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358; *Barker v. Kansas City,*

a movement in interstate commerce.<sup>47</sup> "But it is also certain that a particular interstate movement must come to an end," said the court in the *Knox* case, cited, "and that the act may cease to apply when the movement ceases. If these cars had been billed from New York state to Pitcairn, so that the journey had been defined and the end of the journey had been determined, there would be much reason in the contention that the interstate movement was still going on. On the other hand, if they had been expressly billed to Brookville and Irvineton, respectively, it would not be easy to avoid the conclusion that the interstate movement had ceased at these points, and that the movement afterwards was wholly within the state. But the evidence shows that

*M. & O. R. Co.*, 88 Kan. 767, 43 L. R. A. (N. S.) 1121, 129 Pac. 1151.

**Kentucky.** *Louisville & N. R. Co. v. Holloway's Adm'r*, 163 Ky. 125, 173 S. W. 343.

**Missouri.** *Trowbridge v. Kansas City & W. B. Ry. Co.*, 192 Mo. App. 52, 179 S. W. 777; *Hearst v. St. Louis, I. M. & S. R. Co.*, 188 Mo. App. 36, 173 S. W. 86; *Thompson v. Wabash R. Co.*, 262 Mo. 468, 171 S. W. 364.

**North Carolina.** *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744.

**North Dakota.** *Hein v. Great Northern R. Co.*, 34 N. D. 440, 159 N. W. 14.

**Pennsylvania.** *Moyer v. Pennsylvania R. Co.*, 247 Pa. 210, 93 Atl. 282.

**Texas.** *Kansas City, M. & O. Ry. Co. of Texas v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

**Washington.** *Wesseler v. Great Northern R. Co.*, 90 Wash. 234, 155 Pac. 1063, 157 Pac. 461.

"It frequently happens that the railway companies load cars with livestock or farm produce in the

western states, and carry the same to the eastern markets, and then return these cars without a load; but it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."—Judge Shiras in *Voelker v. Chicago, M. & St. P. Ry. Co.*, *supra*, construing the Safety Appliance Act.

In *Norfolk & W. R. Co. v. Com.*, 93 Va. 749, 34 L. R. A. 105, 57 Am. St. Rep. 827, 24 S. E. 837, the court held that a railroad company was not engaged in interstate commerce while moving a train of empty coal cars over its line from a point in Virginia to a point in West Virginia; but this decision is erroneous.

47. *Pennsylvania R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748; *Louisville & N. R. Co. v. Strange's Adm'r* 156 Ky. 439, 161 S. W. 239; *Fairchild v. Pennsylvania R. Co.*, 170 N. Y. App. Div. 135, 155 N. Y. Supp. 751.



the cars were not billed at all, and therefore, as the character of the movement depended on the uncontradicted testimony of the witnesses, we feel bound on this record to accept the facts as the witnesses state them. And, if they are so accepted, we cannot avoid the conclusion that these cars had finished their interstate journey when they reached the first halting place in Pennsylvania. They had no more distant destination; they did not leave New York with any other terminus in view; they were then immediately available for any use; in a word, to use the expressive phrase of one of the witnesses, they were 'drifting,' waiting to be assigned for service. Moreover, they were in the owner's possession, and he was in full control, so that they did not need to go further in order to be 'at home.' When, indeed, it may be asked, would such cars lose their interstate character, if they had not lost it under the facts before us? It is difficult to see what other satisfactory test can be applied, for it is clear that they could not remain interstate cars indefinitely. They might have been sent to the repair shop at the first halting place, or have actually been used to carry freight between Pennsylvania points, and in either event it could not be denied that their interstate character had ceased. Being bound nowhere, we think they became domestic cars after the owner had them in his possession and under his control at the first appropriate distributing point within the state. If the end of a journey has been defined, that presents one situation; if in fact the end has not been expressly determined, the law must determine it in accordance with what is reasonable and just. In the Zachary case, there was no such evidence as is now before us; the court found it to be a reasonable inference that the cars then in question were in the process of being 'carried forward as a part of a through movement of interstate commerce.' " "It is entirely clear that taking the road engine from Phillipsburg, Kansas, to Council Bluffs, Iowa, was an act of interstate commerce, and that the interstate, while participating in that act, was employed in such commerce. That the engine was not in commercial use but merely on the

way to a repair shop is immaterial. It was being taken from one State to another and this was the true test of whether it was moving in interstate commerce."<sup>48</sup>

**§ 445. Transportation from Point to Point in One State Passing Through Another State in Transit.** All common carriers are subject to regulation as to their liabilities to employes for injuries. Those operating exclusively within a state are subject to the laws of the state; those operating among the states are subject to federal control. Formerly, a few courts held that the transportation of commodities by railroad between two points in the same state which, in transit, passed over a portion of another state, constituted intrastate commerce, and, hence, was under the control of the state.<sup>49</sup> But to bring the transportation of a common carrier within the control of a state as a part of its domestic commerce, the commodity transported must be, during the entire journey, under the exclusive jurisdiction of that state.<sup>50</sup> Hence, transportation between points within a single state over a route partly outside of the state, constitutes interstate commerce. Carriers engaged therein are, therefore, under the exclusive control of the national Employers' Liability Act in so far as their liabilities for injuries arising in interstate commerce are concerned.<sup>51</sup>

48. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185.

49. *Campbell v. Chicago, M. & St. P. Ry. Co.*, 86 Iowa 587, 17 L. R. A. 443, 53 N. W. 351; *State v. Seagraves*, 111 Mo. App. 353, 85 S. W. 925; *Seawell v. Kansas City, Ft. S. & M. R. Co.*, 119 Mo. 222, 24 S. W. 1002; *Leavell v. Western U. Tel. Co.*, 116 N. C. 211, 27 L. R. A. 843, 47 Am. St. Rep. 798, 21 S. E. 391; *Railroad Com'rs v. Western U. Tel. Co.*, 113 N. C. 213, 22 L. R. A. 750, 18 S. E. 389; *Western U. Tel. Co. v. Hughes*, 104 Va. 240, 51 S. E. 225.

50. *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. Ed. 333, 23 Sup. Ct. 214; *Lord v. Goodall, Nelson & Perkins Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224; *Pacific Coast Steamship Co. v. Board Railroad Com'rs*, 18 Fed. 10; *State v. Chicago, St. P., M. & O. Ry. Co.*, 40 Minn. 267, 3 L. R. A. 238, 12 Am. St. Rep. 730, 41 N. W. 1047.

51. *United States v. United States v. Erie R. Co.*, 166 Fed. 352; *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775; *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269.

**§ 446. When Reshipment from Point of Delivery Changes Interstate Character of Traffic.** When a shipment from point A in one state to point B in another state, is delivered to and accepted by the consignee at B and the consignee thereafter reships such a commodity from B to C in the same state—the line between the two points being wholly within the one state—the last shipment is an intrastate one and the carrier, in hauling it between B and C is not engaged in interstate commerce. For the interstate shipment under such conditions was concluded and determined by a final delivery at B, the place intended by the shipper and carrier for final delivery.<sup>52</sup>

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Spriggs*, 113 Ark. 118, 167 S. W. 96; *St. Louis & S. F. R. Co. v. State*, 87 Ark. 562, 113 S. W. 203.

**California.** *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 18 L. R. A. 221, 28 Am. St. Rep. 142, 29 Pac. 873.

**Idaho.** *Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Idaho 106, 132 Pac. 975.

**Kansas.** *Leibengood v. Missouri, K. & T. R. Co.*, 83 Kan. 25, 28 L. R. A. (N. S.) 985, 109 Pac. 988; *Patterson v. Missouri Pac. R. Co.*, 77 Kan. 236, 15 L. R. A. (N. S.) 733, 94 Pac. 138.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 155 Ky. 153, 159 S. W. 695; *Louisville & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198.

**Maryland.** *State v. Cumberland & P. R. Co.*, 105 Md. 478, 66 Atl. 458.

**Minnesota.** *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 110 Minn. 25, 19 Ann. Cas. 1088, 124 N. W. 819.

**Missouri.** *Bowles v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 187 S. W. 131; *Howard v. Chicago,*

*R. I. & P. Ry. Co.*, — Mo. App. —, 184 S. W. 906; *Potter v. Kansas City Southern R. Co.*, 187 Mo. App. 56, 172 S. W. 1153; *Deardorf v. Chicago, B. & Q. R. Co.*, 263 Mo. 65, 172 S. W. 333; *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052.

**Oklahoma.** *Western U. Tel. Co. v. Kaufman*, — Okla. —, 162 Pac. 708.

**Texas.** *Wichita Falls & W. Ry. Co. of Texas v. Asher*, — Tex. Civ. App. —, 171 S. W. 1114.

52. **United States.** *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517; *Pennsylvania R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748; *Oregon R. & Nav. Co. v. Campbell*, 180 Fed. 253.

**Arizona.** *Southern Pac. Co. v. State*, — Ariz. —, 165 Pac. 303.

**Indiana.** *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

**Kentucky.** *Louisville & N. R. Co. v. Meador's Adm'r*, 176 Ky. 765, 197 S. W. 440.

For instance, a car of corn was carried upon a bill of lading from Hudson, S. Dak., to Texarkana, Tex., and five days afterwards it was reshipped from Texarkana to Goldthwaite, both points being in the state of Texas. It was sought to hold the railroad company liable for violation of the regulations of the state railroad commission applicable to intrastate carriers in the state of Texas. On the other hand the railroad company contended that the shipment was interstate from Hudson to Goldthwaite. The court held that the shipment from Texarkana to Goldthwaite was an intrastate shipment unaffected by the fact that the shipper intended to re-ship the corn from Texarkana to Goldthwaite, for the corn had been carried to Texarkana upon a contract for interstate shipment and the reshipment five days later upon a new contract was an independent intrastate shipment.<sup>53</sup>

A close case on the facts in which the same principle was applied, was decided by the Kentucky Court of Appeals. A train consisting of 19 empty coal cars was brought into Russellville, Ky., some of the cars having been brought from Tennessee. The conductor of the train in which the cars were brought to Russellville, had been directed to take the cars to Russellville and no further orders had been given for their destination and no one had orders to carry them further. After reaching Russellville a new order was issued directing that they be taken to another point in the same state. Decedent was a flagman on the train leaving Russellville and each car in the train, including the coal cars, was destined to another point within the same state. The court held that the interstate journey of the cars ended at Russellville and that, after leaving Russell-

Mississippi. *Batesville Southwestern R. Co. v. Mims*, 111 Miss. 574, 71 So. 827.

Missouri. *State ex rel. Chicago, M. & St. P. R. Co. v. Public Service Commission of Missouri*, 269 Mo. 63, 189 S. W. 377; *Smith v. Gulf, C. & S. F. R. Co.*, 177 Mo.

App. 269, 164 S. W. 132.

Texas. *Missouri, K. & T. Ry. Co. of Texas v. Pace*, — Tex. Civ. App. —, 184 S. W. 1051.  
53. *Gulf, C. & S. F. R. Co. v. State*, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. 360.



ville, the train was moving solely in intrastate commerce and that no action for decedent's death could be maintained under the federal statute. The court properly assumed that hauling even empty coal cars from a point in one state to a point in another constituted interstate commerce, but in view of the controlling fact that the cars originating in Tennessee were only destined to Russellville, and that at the latter point orders were issued for their further destination, which was in the same state, the interstate journey ended at Russellville.<sup>54</sup>

In another case it appeared that a coal company shipped cars of coal over certain railroads from points in Illinois to Davenport, Ia., and there reshipped the cars of coal over another railroad to points in Iowa. In a suit to have declared invalid an order of the Iowa commission, it was held that the shipments from Davenport to points in Iowa were intrastate. Justice Hughes, speaking for the United States Supreme Court in that case, said: "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract. *Ohio Railroad Commission v. Worthington*, 225 U. S. 101; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Railroad Commission of Louisiana v. Texas & Pacific Ry. Co.*, 229 U. S. 336. But the fact that commodities received on interstate shipments are reshipped by the consignee, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same state from having an independent and intrastate character. *Gulf, C. & S. F. Ry. Co. v. Texas*, 204 U. S. 403; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, 109; *Texas & N. O. R. R. Co., v. Sabine Tram Co.*, 227 U. S. 111, 129, 130. The question is with respect to the nature of the actual movement in the particular case; and we are unable to

54. *Louisville & N. R. Co. v. R. Co. v. Knox*, 134 C. C. A. 426, *Strange's Adm'x*, 156 Ky. 439, 161 218 Fed. 748. S. W. 239. Accord: *Pennsylvania*

say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the commission must be taken as referring solely to intrastate transportation originating at Davenport."<sup>55</sup>

**§ 447. When Reshipment from Point of Delivery Does not Change Interstate Character of Traffic.** But where a shipper intends from the beginning that the transportation shall be continued beyond the destination originally indicated, then the interstate transportation continues, and a rebilling or reshipment enroute does not, of itself, break the continuity of the movement or require that any part of the transportation be classified differently from the remainder.<sup>56</sup>

55. *Chicago, M. & St. P. R. Co. v. Iowa*, 233 U. S. 334, 58 L. Ed. 988, 34 Sup. Ct. 592.

56. **United States.** *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 61 L. Ed. 1181, 37 Sup. Ct. 623; *Western Transit Co. v. A. C. Leslie & Co.*, 242 U. S. 448, 61 L. Ed. 423, 37 Sup. Ct. 133; *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, 36 Sup. Ct. 665; *South Covington & C. St. R. Co. v. City of Covington*, 235 U. S. 537, 59 L. Ed. 350, 35 Sup. Ct. 158; *Railroad Commission of Louisiana v. Texas & P. R. Co.*, 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. 837; *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. 229; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. 653; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. 279; *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. 722; *Ala-*

*bama Great Southern R. Co. v. George H. McFadden & Bros.*, 232 Fed. 1000; *Belt R. Co. of Chicago v. United States*, 93 C. C. A. 666, 168 Fed. 542, 22 L. R. A. (N. S.) 582; *Chicago, M. & St. P. Ry. Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264; *Kanotex Refining Co. v. Atchison, T. & S. F. Ry. Co.*, 34 I. C. C. 271.

**Kansas.** *Missouri, K. & T. R. Co. v. New Era Milling Co.*, 80 Kan. 141, 101 Pac. 1011.

**Kentucky.** *Louisville & N. R. Co. v. Meador's Adm'r*, 176 Ky. 765, 197 S. W. 440; *Howard & Callahan v. Illinois Cent. R. Co.*, 161 Ky. 783, 171 S. W. 442.

**Missouri.** *Reynolds v. St. Louis Southwestern Ry. Co.*, — Mo. App. —, 190 S. W. 423; *Werner Saw Mill Co. v. Kansas City Southern R. Co.*, 194 Mo. App. 618, 186 S. W. 1118.

**Oregon.** *Baldwin Sheep & Land Co. v. Columbia R. Co.*, 58 Ore. 285, 114 Pac. 469.

**Rhode Island.** *Glenlyon Dye Works v. Interstate Exp. Co.*, 36 R. I. 558, 91 Atl. 5.

A shipper consigned a commodity from St. Louis, Missouri, to Leadville, Colo. It was transported over one railroad from St. Louis to Pueblo, Colo., the receiving carrier giving a receipt showing that the commodity was to be delivered to the consignee at Leadville via another railroad. No through bill of lading was issued and no through route had been established. The first company issued a bill of lading for the shipment from St. Louis to Pueblo at a local rate. The car was there delivered to another railroad company at a local rate which company named the first railroad company as consignor to the consignee. The freight charges were always collected either at point of origin or at destination and divided according to the local rates of each. It was held by the United States Supreme Court that while there was no through rate or through route, there was in fact a through shipment from St. Louis, Mo., to Leadville, Colo., and the interstate character of the shipment could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local way bills and thus attempting to convert an interstate shipment into an intrastate shipment. The court quoting from a former decision, said: "When goods shipped from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce."<sup>57</sup>

In another case shippers delivered to a carrier at certain stations in the state of Louisiana eighteen carloads of logs and staves to be transported by railway from said stations to Alexandria, La., and there deliv-

- |  |  |
|--|--|
| <p><b>Texas.</b> Gulf, C. &amp; S. F. Ry. Co. v. Mathis, — Tex. Civ. App. —, 194 S. W. 1135; Galveston, H. &amp; S. A. R. Co. v. Wood-Hagenbarth Cattle Co., 105 Tex. 178, 146 S. W. 538; Texas &amp; P. R. Co. v. Taylor, 103 Tex. 367, 126 S. W. 1117,</p> | <p>1200.<br/><b>Wisconsin.</b> Duluth-Superior Milling Co. v. Northern Pac. R. Co., 152 Wis. 528, 140 N. W. 1105.<br/>57. Baer Bros. v. Denver &amp; R. G. R. Co., 233 U. S. 479, 58 L. Ed. 1055, 34 Sup. Ct. 641.</p> |
|--|--|



ered to another railroad company which transported them to New Orleans, La., where they were unloaded from the cars, put on board ship and exported to foreign countries. The bills of lading in each instance provided for the delivery of the freight from the initial point to New Orleans, there to be delivered to the shipper or consignee's order. The consignee resided at New Orleans and was a broker engaged in negotiating for foreign shipments and attending to shipments for consignors in the United States. But notwithstanding the bills of lading the staves and logs were intended by the shippers to be exported to foreign countries and were treated by both shippers and carriers accordingly, the shippers always holding the cars on the railroad track at New Orleans until they could accumulate cargo to fill their export orders and arrange for transportation. The railroad company allowed shippers twenty days' time for delivery, as in the case of all export shipments, without charging demurrage which the company would have had the right to charge after the expiration of four days if the shipments had been considered and treated as purely intrastate. The sole question before the United States Supreme Court was whether the shipments were foreign or intrastate commerce while moving through Louisiana. The court held that they were foreign shipments, and that the cargo took that character when it was actually started in the course of transportation to a foreign country, although it was transported within the state under local bills of lading. The staves and logs were intended by the shippers to be exported to foreign countries and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.<sup>58</sup>

**§ 448. Proof that Injured Servant is Employed in Interstate Commerce Sufficient to show that the Railroad is so Engaged.** To permit an employe to recover under the federal act, it must be shown that at the time of the

58. Railroad Commission of U. S. 336, 57 L. Ed. 1215, 33 Sup. Louisiana v. Texas & P. R. Co., 229 Ct. 837.



accident, first, the carrier was engaged in interstate commerce, and, second, that the injured servant was employed by it in such commerce.<sup>59</sup> Since the act of a servant within the scope of his employment is in legal contemplation the act of the master, if it is shown that the injured employe at the time of the accident was engaged in interstate commerce by virtue of his employment on the railroad, then it necessarily follows that the carrier is so engaged.<sup>60</sup> Hence in an action under the act, evidence that the employe was employed in such commerce at the time of the accident is sufficient to show that the carrier was so engaged. But the converse of the proposition stated is not true, for proof that the carrier at the time of the injury was engaged generally in interstate commerce, does not prove that the injured servant was also employed by it in such commerce unless the specie of evidence introduced to show the carrier was so engaged, is the act and work of the servant when injured. Since, therefore, by virtue of a well-known principle in the law of agency the act of servant is the act of master, decisions of the courts construing when an employe is engaged in interstate commerce, are quite applicable under questions discussed in this chapter and opinions there cited are relevant here.<sup>61</sup>

**59. United States.** *Lucchetti v. Philadelphia & R. Ry. Co.*, 233 Fed. 137; *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335; *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

**Louisiana.** *Gordon v. New Orleans Great Northern R. Co.*, 135 La. 137, 64 So. 1014.

**Minnesota.** *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005.

**Mississippi.** *New Orleans, M. & C. R. Co. v. Jones*, 111 Miss. 852, 72 So. 681.

**Montana.** *Alexander v. Great Northern R. Co.*, 51 Mont. 565, 154 Pac. 914.

**Oklahoma.** *Atchison, T. & S. F. R. Co. v. Pitts*, 44 Okla. 604, 9 N. C. C. A. 545, 145 Pac. 1148.

**Pennsylvania.** *Hogarty v. Philadelphia & R. R. Co.*, 245 Pa. 443, 91 Atl. 854.

**Utah.** *Grow v. Oregon Short Line R. Co.*, 44 Utah 160, Ann. Cas. 1915B 481, 138 Pac. 398.

**West Virginia.** *McKee v. Ohio Valley Elec. R. Co.*, 78 W. Va. 131, 88 S. E. 616.

**60.** *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764.

**61.** *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832, *aff'd* in 113 C. C. A. 379, 192 Fed. 901.

## CHAPTER XXIII.

### EMPLOYEES ENGAGED IN INTERSTATE COMMERCE—GENERAL PRINCIPLES.

- Sec. 449. Statute Includes Only Employees Injured While Engaged in Interstate Commerce.
- Sec. 450. Employment in Interstate Commerce not Restricted or Limited to Actual Transportation from One State to Another.
- Sec. 451. Same Act May Constitute Interstate Employment in One Relation and not in Another.
- Sec. 452. Criterion Adopted by United States Supreme Court in Determining Employment in Interstate Commerce.
- Sec. 453. Employees Presumed to be Engaged in Intrastate Commerce.
- Sec. 454. Prior or Subsequent Employment Immaterial in Determining Applicability of Federal Statute.
- Sec. 455. Servants Employed in Both Intrastate and Interstate Commerce.
- Sec. 456. Employees on Premises of Railroad Company Going to or from Work.
- Sec. 457. Status of Employees Injured While Going to or from Day's Work Partly in Interstate and Partly in State Commerce.
- Sec. 458. Employer not Liable to Employee Injured After Day's Work is Over—Sleeping in Cars.
- Sec. 459. Effect of Temporary Cessation in or Abandonment of Work in Interstate Commerce.
- Sec. 460. Employees of Private Carriers Transporting their Own Property not Subject to Statute.
- Sec. 461. When Questions of Employment in Interstate Commerce should be Submitted to Jury.
- Sec. 462. Decisions Construing Federal Safety Appliance Act not always Applicable in Construing Employers' Liability Act.
- Sec. 463. Instances where Employees were Engaged in Interstate Commerce but Erroneously Held to Have Been Engaged in Intrastate Commerce.
- Sec. 464. Instances Where Employees Were Engaged Exclusively in Intrastate Commerce but Erroneously Held to have been Engaged in Interstate Commerce.
- Sec. 465. Burden of Proving Interstate Employment is Upon the Plaintiff.
- Sec. 466. Burden of Proving Interstate Employment upon Defendant, When.

**§ 449. Statute Includes Only Employees Injured While Engaged in Interstate Commerce. The statute**

provides that a common carrier by rail, while engaging in interstate commerce, is liable for injuries or death to an employe, due to negligence, "while he is employed by such carrier in such commerce." The employe must have been at the time of the injury engaged in interstate commerce.<sup>1</sup> Frequently a troublesome question

1. **United States.** *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116; *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153, Ann. Cas. 1914C 163; *Hudson & M. R. Co. v. Iorio*, 152 C. C. A. 641, 239 Fed. 855; *Erie R. Co. v. Krysienski*, 151 C. C. A. 218, 238 Fed. 142; *Kelly v. Pennsylvania R. Co.*, 151 C. C. A. 171, 238 Fed. 95; *Coal & Coke Co. v. Deal*, 145 C. C. A. 490, 231 Fed. 604; *Erie R. Co. v. Van Buskirk*, 143 C. C. A. 71, 228 Fed. 489; *Erie R. Co. v. Jacobus*, 137 C. C. A. 151, 221 Fed. 335.

**Alabama.** *Mathews v. Alabama Great Southern R. Co.*, — Ala. —, 76 So. 17; *Loveless v. Louisville & N. R. Co.*, — Ala. —, 75 So. 7; *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960; *Western Ry. of Alabama v. Mays*, — Ala. —, 72 So. 641; *Louisville & N. R. Co. v. Carter*, 195 Ala. 382, Ann. Cas. 1917E 292, 70 So. 655; *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611; *Ex parte Atlantic Coast Line R. Co.*, 190 Ala. 132, 67 So. 256.

**Arkansas.** *Long v. Biddle*, 124 Ark. 127, 186 S. W. 601.

**California.** *Southern Pac. Co. v. Industrial Accident Commission of California*, 174 Cal. 8, 161 Pac. 1139.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Georgia.** *Hardy v. Atlantic &*

*W. P. R. Co.*, — Ga. App. —, 93 S. E. 18.

**Illinois.** *Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310, 106 N. E. 843.

**Indiana.** *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659; *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —, 111 N. E. 653.

**Kentucky.** *Louisville & N. R. Co. v. Netherton*, 175 Ky. 159, 193 S. W. 1035; *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690; *Chesapeake & O. R. Co. v. Harmon's Adm'r*, 173 Ky. 1, 189 S. W. 1135; *Schaeffer v. Illinois Cent. R. Co.*, 172 Ky. 337, 189 S. W. 237; *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786; *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375.

**Louisiana.** *Gordon v. New Orleans Great Northern R. Co.*, 135 La. 137, 64 So. 1014.

**Maryland.** *Washington, B. & A. Elec. R. Co. v. Owens*, — Md. —, 101 Atl. 532.

**Massachusetts.** *Lynch v. Boston & M. R. R.*, — Mass. —, 116 N. E. 401; *Corbett v. Boston & M. R. R.*, 219 Mass. 351, 9 N. C. C. A. 691, 107 N. E. 60.

**Minnesota.** *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005.

**Mississippi.** *Yazoo & M. V. R. Co. v. Houston*, — Miss. —, 75 So. 690.

arises as to whether a servant is employed in interstate or intrastate commerce at the time of the accident, for, if the former, the remedy, if any, given by the federal act is exclusive; while if the latter, the state law alone furnishes the remedy, even though at the time the carrier itself was engaged in interstate commerce. Both must be so engaged to render the federal act applicable.<sup>2</sup>

**Montana.** *McBain v. Northern Pac. R. Co.*, 52 Mont. 578, 160 Pac. 654.

**New York.** *Saxon v. Erie R. Co.*, 221 N. Y. 179, 116 N. E. 983; *Shanks v. Delaware, L. & W. R. Co.*, 214 N. Y. 413, Ann. Cas. 1916E 467, 108 N. E. 644; *Hoag v. Ulster & D. R. Co.*, 177 N. Y. App. Div. 433, 164 N. Y. Supp. 529; *Knowles v. New York, N. H. & H. R. Co.*, 177 N. Y. App. Div. 262, 164 N. Y. Supp. 1; *Giovio v. New York Cent. R. Co.*, 176 N. Y. App. Div. 230, 162 N. Y. Supp. 1026; *Shanks v. Delaware, L. & W. R. Co.*, 163 N. Y. App. Div. 565, 148 N. Y. Supp. 1034; *Norton v. Erie R. Co.*, 163 N. Y. App. Div. 466, 148 N. Y. Supp. 769.

**North Carolina.** *Saunders v. Southern R. Co.*, 167 N. C. 375, 83 S. E. 573.

**Oklahoma.** *Chicago, R. I. & P. R. Co. v. Felder*, — Okla. —, 155 Pac. 529.

**Texas.** *Missouri, K. & T. Ry. Co. of Texas v. Watson*, — Tex. Civ. App. —, 195 S. W. 1177.

**Washington.** *Aldread v. Northern Pac. R. Co.*, 93 Wash. 209, 160 Pac. 429; *Bolch v. Chicago, M. & St. P. R. Co.*, 90 Wash. 47, 155 Pac. 422.

**Wisconsin.** *Karras v. Chicago & N. W. R. Co.*, 165 Wis. 578, 162 N. W. 923; *Jacoby v. Chicago, M. & St. P. R. Co.*, 165 Wis. 610, 161

N. W. 751, 164 N. W. 88; *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489; *Ruck v. Chicago, M. & St. P. R. Co.*, 153 Wis. 158, 140 N. W. 1074.

2. *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057, 37 Sup. Ct. 556, 14 N. C. C. A. 957; *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546, 14 N. C. C. A. 680, Ann. Cas. 1917D 1139; *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. 524, 14 N. C. C. A. 597, Ann. Cas. 1917E 900; *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515; *Baltimore & O. R. Co. v. Branson*, 242 U. S. 623, 61 L. Ed. 534, 37 Sup. Ct. 244; *Minneapolis & St. L. R. Co. v. Nash*, 242 U. S. 619, 61 L. Ed. 531, 37 Sup. Ct. 239; *Atlantic Coast Line R. Co. v. Mims*, 242 U. S. 532, 61 L. Ed. 476, 37 Sup. Ct. 188; *Illinois Cent. R. Co. v. Williams*, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. 128; *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127; *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116; *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. Ed. 312, 37 Sup. Ct. 123; *Great Northern R. Co. v. Capital Trust Co.*, 242 U. S. 144, 61 L. Ed. 208, 37



If the reader bears in mind that Congress in passing the act, was not regulating the rights and liabilities of employers and employees *as such*, but was primarily regulating and promoting the safety of those engaged in interstate commerce, and, for that purpose, incidentally declared the rights and liabilities of all railroads and employees only while both were engaged in such commerce, many difficulties in the solution of such a question disappear.<sup>3</sup>

Sup. Ct. 41, L. R. A. 1917E 1050; Louisville & N. R. Co. v. Parker, 242 U. S. 13, 61 L. Ed. 119, 37 Sup. Ct. 4; Illinois Cent. R. Co. v. Cousins, 241 U. S. 641, 60 L. Ed. 1216, 36 Sup. Ct. 446; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992; Osborne v. Gray, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; Seaboard Air Line Ry. Co. v. Kenney, 240 U. S. 489, 60 L. Ed. 762, 36 Sup. Ct. 458; Kanawha & M. R. Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; Southern R. Co. v. Lloyd, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902; New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780; St. Louis, I. M. & S. Ry. Co. v. Craft, 237 U. S. 648, 59 L. Ed. 1160, 35 Sup. Ct. 704, 9 N. C. C. A. 754; Toledo, St. L. & M. R. Co. v. Slavin, 236 U. S. 454, 58 L. Ed. 671, 35 Sup. Ct. 306; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 729, 6 N. C. C. A. 224; Illinois

Cent. R. Co. v. Behrens, 233 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. 646, 10 N. C. C. A. 153, Ann. Cas. 1914C 163; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156; Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. Ed. 355, 33 Sup. Ct. 135, Ann. Cas. 1914B 134; Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141.

3. First Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. 141, in which the Supreme Court declared the Federal Employers' Liability Act of 1906 unconstitutional; In re Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44, in which the Federal Employers' Liability Act of 1908 was held constitutional and valid. Knowles v. New York, N. H. & H. R. Co., 177 N. Y. App. Div. 262,

**§ 450. Employment in Interstate Commerce not Restricted or Limited to Actual Transportation from One State to Another.** The Federal Act prescribes that its provisions shall apply to all injuries sustained while the employe is engaged in interstate commerce; but employment in interstate commerce is not limited or restricted to the work of actually transporting articles of commerce from one state to another.<sup>4</sup> Transportation or carriage is an essential element of commerce between the states, but it does not constitute the entire field covered by the Employers' Liability Act. When the commerce involved is transportation from one state to another, the act of interstate commerce is done by the labor of men and with the help of things. These men and things are the agents and the instruments of the commerce. If the agents or instruments, while they are so employed, are destroyed or interrupted, interstate commerce is affected and interrupted. Commerce, therefore, within the federal Act, includes more than the mere carriage of commodities. Whenever employes are engaged in work which is so directly connected with interstate commerce as to be a part of it, they are within the purview of the federal Act. Many illustrations of this principle will be found in the succeeding paragraphs.

**§ 451. Same Act May Constitute Interstate Employment in One Relation and not in Another.** The test of interstate employment is the relation or connection to interstate transportation of the work at which the employe is engaged at the time of the injury. The same act of work in one relation or situation may constitute employment in such commerce while in another or different connection or situation, it may not be a part of interstate transportation. Thus, a switchman engaged in moving a carload of coal to a coal chute for the purpose of supplying interstate engines with coal was held not to be engaged in interstate commerce by the national Su-

164 N. Y. Supp. 1, citing Roberts' Injuries to Interstate Employees.

4. McKee v. Ohio Valley Elec. R. Co., 78 W. Va. 131, 88 S. E. 616.

preme Court;<sup>5</sup> while on the other hand, a brakeman engaged in doing exactly the same kind of work was by the Supreme Court of Texas, properly held to be engaged in interstate commerce.<sup>6</sup> The switchman, in the Harrington case, however, was a member of a terminal crew and at the time of the injury was engaged in moving intrastate traffic, that is, from the storage tracks for coal to a chute in the same yard; but, in the De Bord case, the employe injured was a brakeman on an interstate train between two terminals. His act in moving a carload of coal to the coal chute for the purpose of supplying the interstate engines, was performed at a way station between terminals. It was a part of his duty in switching cars out of an interstate train so that his work in moving the coal to the chute came within the purview of the decision of the Supreme Court in another case,<sup>7</sup> holding that an employe engaged in switching a car, even though containing intrastate commerce out of an interstate train, was still employed in interstate commerce. To determine the status of an employe with reference to whether the state or federal law controls, each case must be examined in the light of its particular facts with a view of ascertaining whether, at the time of the injury, the employe was engaged in interstate transportation or in an act so directly and immediately connected with such transportation as substantially to form a part or a necessary incident thereof.

**§ 452. Criterion Adopted by United States Supreme Court in Determining Employment in Interstate Commerce.** The test in determining whether an employe of a common carrier by railroad is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, is well established by the controlling

5. Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992.

6. Chicago, R. I. & G. Ry.

Co. v. De Bord, — Tex. —, 192 S. W. 767.

7. New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1.



decisions of the United States Supreme Court, but the difficulty lies in its application to the concrete facts of each case. The following excerpts from leading opinions of that court illustrate the criterion applied: "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it;"<sup>8</sup> "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?";<sup>9</sup> "Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof";<sup>10</sup> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce";<sup>11</sup>

8. *Shanks v. Delaware*, L. & W. R. Co., 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188.

9. *Pedersen v. Delaware*, L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153.

10. *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1.

11. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153, Ann. Cas. 1914C 163.



“By the term of the Employers’ Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act.”<sup>12</sup>

**§ 453. Employees Presumed to be Engaged in Intra-state Commerce.** Until the contrary is shown, it will be presumed in an action for injuries to a railroad employe through the negligence of his employer, in the use or operation of its railway within the state, that he was engaged in intrastate commerce and that he is seeking a remedy under the laws of the state.<sup>13</sup> But another court held that, in such actions, the court will take judicial notice that the railroad company was engaged in interstate commerce.<sup>14</sup> “It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the State. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. The state court, with its intimate

12. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116.

13. *United States. Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486.

*Illinois. Chicago, R. I. & P. R. Co. v. Industrial Board of Illinois*, 273 Ill. 528, L. R. A. 1916F 540, 113 N. E. 80.

*Indiana. Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

*Iowa. Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 40 L. R. A. (N. S.) 684, 128 N. W. 1.

*Maryland. Washington, B. & A. E. R. Co. v. Owens*, — Md. —,

101 Atl. 532.

*Ohio. Erie R. Co. v. Helsh*, 89 Ohio St. 81, 105 N. E. 189.

*Oklahoma. Chicago, R. I. & P. R. Co. v. McBee*, 45 Okla. 192, 145 Pac. 331.

In the absence of an allegation or proof to the contrary, it will be presumed that the work performed by an employe of a railroad company was intrastate and not interstate in character. *Terry v. Southern Pac. Co.*, — Cal. —, 169 Pac. 86.

14. *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821.

knowledge of the local situation, thought that such an assumption on its part would be wholly unwarranted and we cannot say that it erred in this view. The fact that Chattanooga and its suburb, Alton Park, were near the state line did not establish that the cars had crossed it. The defendants knew the actual movement of the cars, and failing to inform the court upon this point cannot complain that they have been deprived of a Federal right."<sup>15</sup>

**§ 454. Prior or Subsequent Employment Immaterial in Determining Applicability of Federal Statute.** The nature of an employe's work at the very time of an injury is the test in determining whether his rights and the liability of the defendant are governed by the federal statute to the exclusion of all state laws. Whether he had previously been engaged in interstate commerce, or whether it was contemplated that he would be so engaged after his immediate duty at the time of the injury had been performed, is immaterial.<sup>16</sup> "That he was expected, upon the completion of that task, to engage in another which would have been a part of the interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."<sup>17</sup> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate com-

15. *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486. See Section 465, *infra*.

16. *Illinois Cent. R. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 Sup. Ct. 446; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992; *Shanks v. Delaware, L. & W. R. Co.*, 239

U. S. 556, 60 L. Ed. 436, 36 Sup. St. 188; *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1.

17. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153, Ann. Cas. 1914C 163.

merce is not sufficient to bring the case within the act.<sup>18</sup>

**§ 455. Servants Employed in Both Intrastate and Interstate Commerce.** Although an employe is at the time engaged in intrastate commerce as well as interstate commerce, as, for instance, an employe on a train hauling both kinds of commerce or a carpenter repairing a bridge over which both kinds of commerce are carried, yet if injured under such circumstances, he cannot take his choice of remedy under the state and federal law, for the courts hold that he is then engaged in interstate commerce and the remedy given by the national act is exclusive.<sup>19</sup> An extreme and a proper application of this principle is the following: A brakeman injured on a train containing nothing but intra-

18. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116. But see Section 505, *infra*.

19. **United States.** *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153; *rev'g* 117 C. C. A. 33, 197 Fed. 537, which *aff'd* 184 Fed. 737; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C, 176; *Waters v. Guile*, 148 C. C. A. 298, 234 Fed. 532.

**Alabama.** *Western Ry. of Ala. v. Mays*, — Ala. —, 72 So. 641.

**Indiana.** *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

**Iowa.** *Bruckshaw v. Chicago, R. I. & P. R. Co.*, 173 Iowa 207, 155 N. W. 273; *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499.

**Massachusetts.** *Morrison v. Commercial Towboat Co.*, — Mass. —, 116 N. E. 499.

**Michigan.** *Fernette v. Pere Marquette R. Co.*, 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834.

**Minnesota.** *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498, 150 N. W. 165.

**Missouri.** *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787.

**Montana.** *McBain v. Northern Pac. R. Co.*, 52 Mont. 578, 160 Pac. 654.

**North Carolina.** *Horton v. Seaboard Air Line R. Co.*, 157 N. C. 146, 72 S. E. 958.

**Texas.** *Texas & P. Ry. Co. v. Sherer*, — Tex. Civ. App. —, 183 S. W. 404; *Southern Pac. Co. v. Vaughn*, — Tex. Civ. App. —, 165 S. W. 885.

**Vermont.** *Lynch's Adm'r v. Central Vermont R. Co.*, 89 Vt. 363, 95 Atl. 683.

**Washington.** *Bolch v. Chicago, M. & St. P. R. Co.*, 90 Wash. 47, 155 Pac. 422; *Snyder v. Great*

state shipments has no remedy under the federal act but the minute that any specie of merchandise destined to a point beyond the state is placed in that train, then if the brakeman on that train is injured, he is engaged in interstate commerce, although every other commodity in that train is a shipment between two points in the same state.<sup>20</sup>

**§ 456. Employees on Premises of Railroad Company Going to or from Work.** The federal statute not only includes employes actually engaged in interstate commerce but it also covers such employes on the railroad premises while going to or from their work; for, in such cases, they are only doing that which is essential to enable them to discharge their duties as employes engaged in interstate commerce.<sup>21</sup> For instance, a railroad

Northern R. Co., 88 Wash. 49, 152 Pac. 703.

**West Virginia.** Findley v. Coal & Coke R. Co., 76 W. Va. 747, 87 S. E. 198.

20. *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 48, 157 Fed. 342, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893. Decedent was brakeman with a switching crew in a freight yard. He was killed while switching cars. The evidence was silent as to whether the cars contained interstate shipments. It was held that his widow suing as administratrix could not recover under the federal act. *Hench v. Pennsylvania R. Co.*, 246 Pa. 1, L. R. A. 1915D 557, Ann. Cas. 1916D 230, 91 Atl. 1056.

21. *United States. Pryor v. Bishop*, 148 C. C. A. 25, 234 Fed. 9; *Chicago, K. & S. R. Co. v. Kindlesparker*, 148 C. C. A. 17, 234 Fed. 1; *Grand Trunk R. Co. of Canada v. Knapp*, 147 C. C. A. 624, 233 Fed. 950, 13 N. C. C. A. 1100; *Delaware & H. Co. v. Ket-*

*147 C. C. A. 101, 233 Fed. 31; Great Northern R. Co. v. Mustell*, 138 C. C. A. 305, 222 Fed. 879; *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234; *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870; *Feaster v. Philadelphia & R. Ry. Co.*, 197 Fed. 580; *Lamphere v. Oregon R. & Nav. Co.*, 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1; *Harvey v. Texas & P. R. Co.*, 92 C. C. A. 237, 166 Fed. 385; *St. Louis Southwestern R. Co. v. Harvey*, 75 C. C. A. 536, 144 Fed. 806; *Ellsworth v. Metheney*, 44 C. C. A. 484, 104 Fed. 119, 51 L. R. A. 389.

**Alabama.** *Virginia Bridge & Iron Co. v. Jordan*, 143 Ala. 603, 5 Ann. Cas. 709, 42 So. 73.

**Georgia.** *Savannah & N. W. Ry. v. Roach*, 19 Ga. App. 388, 91 S. E. 506; *Macon, D. & S. R. Co. v. Robinson*, 19 Ga. App. 370, 91 S. E. 492; *Seaboard Air-Line Ry. Co. v. McMichael*, 143 Ga. 689, 85 S. E. 891.



section man had been engaged in ballasting the main track of a railroad which carried freight and passen-

**Illinois.** Staley v. Illinois Cent. R. Co., 268 Ill. 356, L. R. A. 1916A 450, 109 N. E. 342.

**Kansas.** McQueen v. Central Branch U. P. R. Co., 30 Kan. 689, 1 Pac. 139.

**Kentucky.** Louisville & N. R. Co. v. Walker's Adm'r, 162 Ky. 209, 172 S. W. 517.

**Massachusetts.** Gilman v. Eastern R. Corporation, 106 Allen (Mass.) 233, 87 Am. Dec. 635.

**Michigan.** Salabrin v. Ann Arbor R. Co., — Mich. —, 160 N. W. 552.

**Minnesota.** Davis v. Chicago, R. I. & P. R. Co., 134 Minn. 49, 158 N. W. 911.

**Missouri.** Smith v. Pryor 195 Mo. App., 259, 190 S. W. 69.

**Nebraska.** Huxoll v. Union Pac. R. Co., 99 Neb. 170, 155 N. W. 900.

**New York.** Ames v. New York Cent. R. Co., — N. Y. App. Div. —, 165 N. Y. Supp. 84; Vick v. New York Cent. & H. River R. Co., 95 N. Y. 267, 47 Am. Rep. 36.

**Rhode Island.** Allen v. Gerard, 21 R. I. 467, 49 L. R. A. 351, 79 Am. St. Rep. 816, 44 Atl. 592.

**Texas.** Texas & P. Ry. Co. v. White, — Tex. Civ. App. —, 177 S. W. 1185; Missouri, K. & T. Ry. Co. of Texas v. Rentz, — Tex. Civ. App. —, 162 S. W. 959.

**Utah.** Grow v. Oregon Short Line R. Co., 44 Utah 160, Ann. Cas. 1915B 481, 138 Pac. 398.

**Washington.** Horton v. Oregon-Washington R. & Nav. Co., 72 Wash. 503, 47 L. R. A. (N. S.) 8, 130 Pac. 897.

**West Virginia.** Easter v. Virginian R. Co., 76 W. Va. 383, 11

N. C. C. A. 101, 86 S. E. 37.

**Wisconsin.** Molzoff v. Chicago, M. & St. P. R. Co., 162 Wis. 451, 11 N. C. C. A. 273, 156 N. W. 467; Ewald v. Chicago & N. W. Ry. Co., 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591.

A section man, killed at a tool house of a railroad company a few minutes before 7 o'clock in the morning, the hour prescribed for the commencement of his work, was engaged in interstate commerce although at the time he was not engaged in any labor for the carrier. Stool v. Northern P. R. Co., — Or. —, 172 Pac. 101.

An electrical engineer employed by a common carrier to instruct its motormen how to operate electric motors over a part of its railway was engaged in interstate commerce although at the time he received an injury he was returning to his headquarters. Dumphy v. Norfolk & W. R. Co., — W. Va. —, 95 S. E. 863.

A locomotive fireman who had returned from his regular run on a Saturday evening and who was to go out again at 3:45 a. m. on Monday morning, was not engaged in interstate commerce when walking through the railroad yards on Sunday for the purpose of taking his tools from an engine on which he had worked at some previous time but not on the preceding day, to the engine upon which he was scheduled to leave on the following morning, because his act in going for the tools, the court held, was not directly and immediately connected with the work on which he expected to be employed on the fol-

gers between different stations. At the time he was injured he was returning to the camp at the conclusion of his day's labor on the handcar. The court held that he was still engaged in interstate commerce within the terms of the national statute.<sup>22</sup> But another court erroneously held that a member of a track-laying gang which worked during the usual hours in the daytime, was employed in interstate commerce while asleep at night in a bunk car on a side track.<sup>23</sup> A track laborer, while walking along a railroad track from a bridge or trestle where he has been at work during the day to "boarding cars" on the right of way of the railroad company, was within the protection of the federal act.<sup>24</sup>

A locomotive fireman in the employ of a railroad company was ordered to proceed from his home to the railway station of the defendant in that town and there secure transportation and go on a certain interstate

lowing day. *Hansen v. New York C. & H. R. R. Co.*, — N. J. —, 103 Atl. 200.

22. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870. Accord: *Grow v. Oregon Short Line R. Co.*, 44 Utah 160, Ann. Cas. 1915B 481, 138 Pac. 398.

23. *Sanders v. Charleston & W. C. Ry. Co.*, 97 S. C. 50, 81 S. E. 283. See section 458, *infra*.

24. *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209, 172 S. W. 517. In that case the court said: "It is very clear that while actually engaged at work for the company he was an employee engaged in interstate commerce, and we think it equally clear that the moment his day's work ended he was not thereby converted into some other kind of an employee, but that he either retained his character as an interstate employee, or became, when his work ended, and while going to the boarding car under the circum-

stances stated, a licensee. After giving to this question careful consideration our opinion is that in going from his place of work to his boarding car he continued in the character of an employee of the company, engaged in interstate commerce. The boarding cars in which he took his meals and remained at night were owned by the company. \* \* \* And so we think that under those circumstances an employee such as Walker was, should be treated as engaged in interstate commerce, not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the company. In other words, within the contemplation of the act, the course of his employment covered, not only the time he was actually engaged at work, but the time he was engaged in going to and from his work."

train to another town in the same state where he was to assist in relieving a train crew which had been employed continuously for more than 16 hours on an interstate train. After receiving this order the fireman hastened to the depot and had reached a crossing in the yards of the railroad company where the cars were cut, when, without warning, the cars were suddenly closed by reason of other cars being negligently "kicked" against them and he thereby sustained injuries causing his death. In a subsequent action under the federal act the petition alleged that at the time of the happening of the injury and death "and immediately prior thereto, he was engaged in the performance of his duty in the employment of the said Oregon Railroad & Navigation Company in doing and performing exclusively the acts and things necessary and proper to be done in the performance of his said duties in obedience to the order of said company, and as a part of the necessities and requirements of the said company in aid of and as a part of the operation of its cars, engines and trains in carrying on defendant's business of interstate commerce by railroad." Under these facts it was held by the Federal Circuit Court of Appeals that the decedent was employed in interstate commerce, the court saying: "The decedent when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to-wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company."<sup>25</sup>

25. *Lamphere v. Oregon R. & Nav. Co.*, 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1, rev'g 193 Fed. 248. Accord: *Missouri, K. & T. Ry. Co. of Texas v. Rentz*, — Tex. Civ. App. —, 162 S. W. 959.



Assuming that the employe was either returning from or going to work for the company in interstate commerce, the question as to whether he was engaged in interstate commerce while so going to or from his work, will depend upon the further question as to when the relation of master and servant commences or ends, as the case may be and the solution of this problem must be made in the light of common law decisions applicable. The relation of master and servant in so far as the obligation to protect the employe is concerned begins when the employe is necessarily on the premises of the master pursuant to his contract of employment.<sup>26</sup> A fireman left his engine in the railroad yards and went to his boarding house on a personal errand. While he was walking through the yards he was struck by some cars. On his return he expected to fire an engine pulling an interstate train. It was held that he was engaged in interstate commerce at the time of the casualty.<sup>27</sup> A hostler who worked in a roundhouse on engines used in hauling both interstate and intrastate commerce was held not to be engaged in interstate commerce while he was walking through the yards to a rest shanty on the property of the railroad company.<sup>28</sup> An extra brake-

26. **United States.** Fletcher v. Baltimore & O. R. Co., 168 U. S. 135, 42 L. Ed. 411, 18 Sup. Ct. 35; Packet Co. v. McCue, 17 Wall. (U. S.) 508, 21 L. Ed. 705; Lamphere v. Oregon R. & Nav. Co., 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1; Harvey v. Texas & P. R. Co., 92 C. C. A. 237, 166 Fed. 385; Dishon v. Cincinnati, N. O. & T. P. Ry. Co., 126 Fed. 194.

**Kansas.** Bumstead v. Missouri Pac. R. Co., 99 Kan. 589, L. R. A. 1917E 734, 162 Pac. 347.

**Kentucky.** Chesapeake & O. R. Co. v. Harmon's Adm'r, 173 Ky. 1, 189 S. W. 1135.

**Massachusetts.** Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90.

**New York.** Boldt v. New York Cent. R. Co., 18 N. Y. 432.

**Texas.** Missouri, K. & T. Ry. Co. of Texas v. Rentz, — Tex. Civ. App. —, 162 S. W. 959.

**Washington.** Hobbs v. Great Northern R. Co., 80 Wash. 678, L. R. A. 1915D 503, 142 Pac. 20.

**Wisconsin.** Gray v. Chicago & N. W. R. Co., 153 Wis. 637, 142 N. W. 505; Ewald v. Chicago & N. W. Ry. Co., 70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12.

27. **North Carolina.** R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159.

28. **Gray v. Chicago & N. W. R. Co., 153 Wis. 637, 142 N. W. 505.** The court in this case also held that hostlers working on engines used indiscriminately in carrying both interstate and intra-



man, working for a railroad company, having been sent out on a passenger train carrying interstate passengers as a brakeman, was, at the time of his injuries, returning on another train on a "pass" back to the division point. In railway parlance he was "dead-heading" back to his headquarters. The court held that he was engaged in interstate commerce although he was not employed on the train he was riding on.<sup>29</sup> A member of a track-laying gang while resting on Sunday in a camp on the right of way was directed by one of the foremen to get on a passing train in order to get the mail for the camp at the next station. When he tried to get on the train he fell and was injured. The court held that he was not engaged in interstate commerce.<sup>30</sup>

A railroad employe at the time he was injured had completed his work for the day and had left the work shop and the premises of the railroad company. He was walking along a street when he was struck by a piece of timber thrown from a train belonging to the railroad company for which he worked. The court held that the relation of master and servant did not exist so as to render the company liable for the act of another employe in negligently throwing the timber.<sup>31</sup> A railroad employe while riding home on one of the company's trains was held not employed in interstate commerce as there was no evidence introduced to show that he was then or had been employed in interstate commerce.<sup>32</sup> The opinion does not disclose the nature of his employ-

state commerce were not engaged in interstate commerce. See section 488, *infra*.

29. *St. Louis & Southwestern Ry. Co. v. Brothers*, — Tex. Civ. App. —, 165 S. W. 488.

30. *Myers v. Norfolk & W. R. Co.*, 162 N. C. 343, 48 L. R. A. (N. S.) 987, 78 S. E. 280. The court in this case based its decision on three cases subsequently overruled in a higher court, *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup.

Ct. 651, Ann. Cas. 1914C 156; *Pedersen v. Delaware, L. & W. R. Co.*, 117 C. C. A. 33, 197 Fed. 537; *Lamphere v. Oregon R. & Nav. Co.*, 193 Fed. 248, 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1.

31. *Fletcher v. Baltimore & P. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, 18 Sup. Ct. 35, 6 App. Cas. (D. C.) 385.

32. *Bennett v. Lehigh Valley R. Co.*, 197 Fed. 578.

ment for the railroad company. A section laborer returning to his sleeping quarters on a hand car after working hours was within the protection of the federal act, provided he was so going under the command of his employer.<sup>33</sup> When an employe is summoned for duty in connection with interstate transportation, he is within the protection of the federal act as soon as he comes upon the premises of the railway company; and, he is also under the same protection while, after leaving his duties, he is passing out of the premises of his employer, provided it is done within a reasonable time and along the usual route.<sup>34</sup>

§ 457. **Status of Employees Injured While Going to or From Day's Work Partly in Interstate and Partly in State Commerce.** That the relationship of master and servant exists at the time of an injury is not sufficient to permit a recovery under the federal act. There must be, in addition thereto, a close and direct connection at the time of the injury with interstate commerce to justify the application of the national statute. The cases discussed and cited in the foregoing paragraph amply sustain the rule that an employe injured on his master's premises while going to or from his place of labor where he is *exclusively* engaged in interstate commerce during the day, is governed by the federal act. On the other hand, an employe injured while on his way to such work for a carrier that constitutes intrastate commerce exclusively, or in work that is not interstate commerce, must look to the laws of the state for a remedy.<sup>35</sup>

But there are many railroad employes whose work during the day is not devoted exclusively to either kind

33. *Salabrin v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552.

34. *Davis v. Chicago, R. I. & P. R. Co.*, 134 Minn. 49, 158 N. W. 911.

35. "The plaintiff was not employed in interstate commerce

during the day, and by the same mark he was not so employed while he was going on the hand-car to and returning from his work." *Sanborn, J.*, in *Bravis v. Chicago, M. & St. P. R. Co.*, 133 C. C. A. 228, 217 Fed. 234.

of commerce. For example, switchmen, during their period of work, are sometimes engaged in interstate and, at other times, in intrastate commerce. What, then, in so far as the applicability of the federal act is concerned, is the status of such an employe if injured on the master's premises while going to or from his place of work? He cannot take his choice of remedy between the state law and the federal act; for both never apply to the same injury. A New York court held, that, under such circumstances, the employe was not engaged in interstate commerce.<sup>36</sup> In that case, it appeared that the employe, a member of a switching crew, was on his way to begin his day's work and was killed while crossing a track in the yard of his employer. His work during the day was not exclusively in interstate commerce, but at times he assisted in the movement of cars containing intrastate traffic, and, at other times, cars containing interstate commerce. His initial work on that day, had he not been killed, was to move interstate cars. A recovery under the federal act was denied, although the court conceded that the relation of master and servant existed at the time of the injury.

The ruling of this court, however, was, no doubt, in effect, overruled by a subsequent decision of the national Supreme Court.<sup>37</sup> In the Winfield case, the employe was in charge of a switch engine in a terminal yard and was engaged, during the day, in switching freight cars. In some, the freight was interstate, in others, intrastate, and in still others, it was of both classes. This was true of the cars moved on the day he was injured. Upon the conclusion of his day's work, he took his engine to the place where it was to remain for the night, and then started to leave the yard for his home. While crossing one of the tracks, he was killed. These facts sustained the conclusion that the deceased was employed in interstate commerce at the time of his death. "In leaving the carrier's yard," said the court,

36. *Knowles v. New York, N. H. & H. R. Co.*, 177 N. Y. App. Div. 262, 164 N. Y. Supp. 1.

37. *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057, 37 Sup. Ct. 556, 14 N. C. C. A. 957.



“at the close of his day’s work the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260, 58 L. Ed. 591, 596, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day’s work, and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day’s work was in both interstate and intrastate commerce, and so, when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is, for present purposes, of no importance.”

**§ 458. Employer not Liable to Employee Injured After Day’s Work is Over—Sleeping in Cars.** A common carrier by railroad is liable only to the servant when the latter is actually in its service, and the relation does not exist where it appears that the performance of the master’s work has been completed.<sup>38</sup> For example, a car accountant who had turned in his report to the office, had left the last place at which all his duties were to be performed, and had, in fact, completed his work for the day, was held not to be employed in interstate commerce while he was leaving the premises of the defendant without any immediate intention of returning to complete any of his duties.<sup>39</sup> A section laborer after quitting work for the day and sometime after 6 p. m. and while returning home, stepped under a box car to protect himself from the rain. While in that

38. *Seaboard Air Line Ry. Co. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481, *aff’g* 99 S. C. 364, 83 S. E. 633; *Fletcher v. Baltimore & P. R. Co.*, 168 U. S. 135, 42 L. Ed. 411, 18 Sup. Ct. 35; *Ames v. New York Cent. R. Co.*, — N. Y. App. Div. —, 165 N. Y. Supp. 84; *Perez v. At-*

*chison, T. & S. F. Ry. Co.*, — Tex. Civ. App. —, 192 S. W. 274; *Beaumont & G. N. R. Co. v. Gonzales*, — Tex. Civ. App. —, 163 S. W. 619.

39. *Jacoby v. Chicago, M. & St. P. Ry. Co.*, 165 Wis. 610, 161 N. W. 751, 164 N. W. 88.



position the car was moved. It was held that he was not employed within the purview of the Federal Act.<sup>40</sup>

In a case before the Supreme Court of South Carolina,<sup>41</sup> it appeared that the plaintiff was a track laborer, and, during working hours, assisted a gang in relaying rails on the defendant's lines of railway and had been so engaged for some weeks. At night he slept on a bunk in a shanty car of a work train which stood on a side track. While asleep at night in the car he was injured in a collision with another train. The Supreme Court of South Carolina, under these facts, held that the plaintiff at the time of his injury was engaged in interstate commerce. In answering the contention of counsel that the plaintiff was not at the time employed in interstate commerce, the court said: "When the plaintiff was in the bunk of his shanty in 'sleep that knits up the ravelled sleeve of care' and getting strength to lay rails next day, the law imputed to him actual service on the track and extended to him the rights of such a worker; 'for the letter (of the law) killeth but the spirit giveth life.'" The ruling of the court in this case was palpably erroneous, for railroad employes while asleep at night and not on duty are not then employed by the carrier in interstate commerce, no matter whether they are taking their rest and sleep in their own homes or in places furnished them by the railroad company by reason of the transitory nature of their work.<sup>42</sup>

The federal statute was enacted only with reference to those railroad employes who, while in the actual discharge of their duties in interstate commerce, are injured. A member of a train crew, therefore, regularly employed in moving trains from a terminal in one state to a terminal in another, was not engaged in interstate commerce while asleep in the caboose at one of the ter-

40. *Perez v. Atchison, T. & S. C. Ry. Co.*, 97 S. C. 50, 81 S. E. F. Ry. Co., — Tex. Civ. App. 283.

—, 192 S. W. 274.

42. See Section 456.

41. *Sanders v. Charleston & W.*

minals between trips.<sup>43</sup> "If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce. His actual employment at the time was holding himself ready in the city of Chicago to respond to a call for service. That the call, when it came, would be for an interstate trip, does not make the waiting in Chicago an actual engagement in interstate commerce, within the terms of the federal act. Plaintiff's claim that, by the hitching on of the caboose in question to the transfer train, decedent's crew was called, and that his interstate service had thus actually begun, does not commend itself to our judgment. It was not, nor was it intended as such. Clearly the crew had not started with the caboose upon their home run. Neither does it appear from the evidence that the caboose and train crew were at the place of the injury for the benefit of defendant, or that they were wanted there at the time, or that there was any understanding that they should be at Landers at or near that time, or that they were at the place of the accident with other right than the mere sufferance of defendant, that being the most convenient way for them to get to Landers and secure sleep and other accommodations for the night, or that they were under any expectancy of a call, or that their acts in the premises had any bearing upon interstate commerce, or that the facts of the case brought the decedent within the provisions of the federal Employers' Liability Act. We are unable to discover from the evidence or the law upon what ground plaintiff's decedent's presence at or near Landers at the time of the accident can be said to have been a step in the performance of any actual service to defendant in interstate commerce. He was there in no sense under the direction of defendant growing out of the relation of master and servant. He was his own master. As was said in *Illinois Central R. R. v. Behrens*, *supra*: 'That he (the servant) was expected, upon the completion of

43. *Pryor v. Bishop*, 148 C. C. A. 25, 234 Fed. 9.

that task (moving intrastate cars), to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.' To hold that decedent was, at the time of the injury—some 4 or 5 hours before he was wanted by defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act.'"<sup>44</sup>

**§ 459. Effect of Temporary Cessation in or Abandonment of Work in Interstate Commerce.** When an employe is engaged in work that constitutes interstate commerce under the Federal Act, a temporary cessation in or temporary absence from his employment does not deprive him of the benefit of the federal statute. Thus, where an employe was engaged in removing snow from railway tracks, a temporary interruption due to the inclemency of the weather during which time the employe took refuge from a storm in a covered car near the tracks, was not an abandonment of his interstate employment.<sup>45</sup> In another case it appeared that a fireman, who had been preparing his engine for an interstate trip, left the engine to go to his boarding house on a personal errand with the expectation of returning within a few minutes. "There is nothing to indicate that this brief visit," said the court,<sup>46</sup> "to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

44. See also *Bumstead v. Missouri Pac. R. Co.*, 99 Kan. 589, L. R. A. 1917E 734, 162 Pac. 347, in which the court held that a freight conductor while dressing and getting breakfast in his waycar where he was accustomed to sleep before he was called for the return trip, was not engaged in in-

terstate commerce.

45. *Armbrecht v. Delaware, L. & W. R. Co.*, — N. J. L. —, 101 Atl. 203.

46. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159.



§ 460. **Employes of Private Carriers Transporting their Own Property not Subject to Statute.** The Employers' Liability Act is limited to servants of common carriers by railroad. The Act does not, therefore, apply to employes of a private carrier by railroad hauling its own property to a point where the interstate transportation over the line of a common carrier commences.<sup>47</sup> In the *McCluskey* case, cited, it appeared that a brakeman in the employ of a logging railroad owned by a mill company, was injured while moving logs from a forest to tide water where they were sold. In denying a recovery under the Federal Act, the court said: "The conclusion of the court below that under these facts the defendants were not engaged in interstate or foreign commerce when the injuries were suffered was based upon the decisions in *Coe v. Errol*, 116 U. S. 517, and *The Daniel Ball*, 10 Wall. 557, from the former of which the following quotations were made: 'When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State.' 116 U. S. 517, 525. 'But this movement (that is, interstate commerce movement) does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. . . . Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within

47. *Bay v. Merrill & Ring Logging Co.*, 243 U. S. 40, 61 L. Ed. 580, 37 Sup. Ct. 376; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 61 L. Ed. 578, 37 Sup. Ct. 374.



the State, and never put in course of transportation out of the State.' 116 U. S. 517, 528. After pointing out that these rulings had not been modified, but on the contrary had been re-affirmed by the subsequent cases relied upon by the plaintiff in error (*Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Louisiana Railroad Commission v. Texas & Pacific Ry. Co.*, 229 U. S. 336; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101) the court said: 'In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the State, depended upon change or the exigencies of trade. The movement of the poles did not become interstate commerce until by the act of the purchasers thereof the poles were started on their way to their destination in another State or country. The beginning of the transit which constitutes interstate commerce is defined in *Coe v. Errol*, to be the point of time when an article is committed to a carrier for transportation to the State of its destination, or started on its ultimate passage. *General Oil Co. v. Crain* 209 U. S. 211, 229. The conclusion of the court below that the defendants were not engaged in interstate or foreign commerce when the accident occurred is, we think, clearly demonstrated by the reasoning by which it sustained its conclusion and

the authorities upon which it relied as above stated, and its judgment should be affirmed."

**§ 461. When Questions of Employment in Interstate should be Submitted to Jury.** Where, under all the evidence in the case, any essential matter bearing on the question of whether the employe was at the time of the injury engaged in interstate commerce, is in doubt, the question should be submitted to the jury under proper instructions.<sup>48</sup> In an action for damages under the federal act the plaintiff may state a cause of action under one count under the state law and in another count under the federal act and if the evidence is such at the close of the introduction of the testimony that it is doubtful in which commerce he was engaged, it becomes a mixed question of law and fact to be submitted to the jury under proper instructions.<sup>49</sup> But the Supreme Court of Oregon held that it was error to submit to the jury whether the common law, state law or federal act, applied.<sup>50</sup>

If it appears at the close of the evidence as a matter of law which statute applies, no doubt it would be error to submit the question to the jury as the court should pass on all questions of law;<sup>51</sup> but if the evidence

48. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; rev'g same case on other grounds in 156 N. C. 496, 72 S. E. 858; Southern Pac. Co. v. Vaughn, — Tex. Civ. App. —, 165 S. W. 885.

49. Atkinson v. Bullard, 14 Ga. App. 69, 80 S. E. 220. See Section 687, *infra*.

50. Oberlin v. Oregon-Washington R. & Nav. Co., 71 Ore. 177, 142 Pac. 554.

51. United States. Hudson & M. R. Co. v. Iorio, 152 C. C. A. 641, 239 Fed. 855.

Georgia. Macon, D. & S. R. Co. v. Robinson, 19 Ga. App. 370, 91 S. E. 492.

Iowa. Pelton v. Illinois Cent. R. Co., 171 Iowa 91, 150 N. W. 236.

Kentucky. Cincinnati, N. O. & T. P. R. Co. v. Hansford, 173 Ky. 126, 190 S. W. 690; Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co., 172 Ky. 55, 188 S. W. 1061.

Michigan. Collins v. Michigan Cent. R. Co., 193 Mich. 303, 159 N. W. 535.

Minnesota. Peery v. Illinois Cent. R. Co., 123 Minn. 264, 143 N. W. 724.

is such that reasonable men could draw different conclusions as to whether the defendant and the injured employe were engaged in intrastate commerce or interstate commerce, then it would be error for the court to decide that issue as all questions of facts should be submitted to the jury under proper charges declaring the law applicable.<sup>52</sup> The conflict between the decisions cited is more apparent than real.<sup>53</sup>

**Oklahoma.** Atchison, T. & S. F. Ry. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545, 145 Pac. 1148.

**Pennsylvania.** Moyer v. Pennsylvania R. Co., 247 Pa. 210, 93 Atl. 282.

**Texas.** Geer v. St. Louis, S. F. & T. Ry. Co., — Tex. —, 194 S. W. 939; Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex. Civ. App. —, 182 S. W. 83.

**Vermont.** Castonguay v. Grand Trunk Ry., — Vt. —, 100 Atl. 908.

**Washington.** Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47, 155 Pac. 422.

**Wisconsin.** Graber v. Duluth, S. S. & A. R. Co., 159 Wis. 414, 150 N. W. 489.

52. **United States.** Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4; Hudson & M. R. Co. v. Iorio, 152 C. C. A. 641, 239 Fed. 855; Carolina, C. & O. R. Co. v. Stroup, 152 C. C. A. 125, 239 Fed. 75; Erie R. Co. v. Krysienski, 151 C. C. A. 218, 238 Fed. 142; Erie R. Co. v. Van Buskirk, 143 C. C. A. 71, 228 Fed. 489; Pennsylvania Co. v. Donat, 139 C. C. A. 665, 224 Fed. 1021; Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, 135 C. C. A. 46, 219 Fed. 148.

**Georgia.** Macon, D. & S. R. Co. v. Robinson, 19 Ga. App. 370, 91 S. E. 492.

**Iowa.** Bruckshaw v. Chicago, R. I. & P. Ry. Co., 173 Iowa 207, 155 N. W. 273; Clark v. Chicago Great Western R. Co., 170 Iowa 452, 152 N. W. 635.

**Kentucky.** Cincinnati, N. O. & T. P. R. Co. v. Hansford, 173 Ky. 126, 190 S. W. 690.

**Minnesota.** Cherpeski v. Great Northern R. Co., 128 Minn. 360, 150 N. W. 1091.

**Oklahoma.** Chicago, R. I. & P. R. Co. v. Felder, — Okla. —, 155 Pac. 529.

**Pennsylvania.** Falyk v. Pennsylvania R. Co., 256 Pa. 397, 100 Atl. 961.

**South Carolina.** Kocnecke v. Seaboard Air Line Ry. Co., 101 S. C. 86, 85 S. E. 374; Camp v. Atlanta & C. Air Line Ry. Co., 100 S. C. 294, 84 S. E. 825; Howell v. Atlantic Coast Line R. Co., 99 S. C. 417, 83 S. E. 639.

**Washington.** Bolch v. Chicago, M. & St. P. R. Co., 70 Wash. 47, 155 Pac. 422.

**Wisconsin.** Graber v. Duluth, S. S. & A. R. Co., 159 Wis. 414, 150 N. W. 489.

53. Patry v. Chicago & W. I. Ry. Co., 265 Ill. 310, 106 N. E. 843, rev'g 185 Ill. App. 361; Atchison, T. & S. F. Ry. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545, 145 Pac. 1148.

**§ 462. Decisions Construing Federal Safety Appliance Act not always Applicable in Construing Employers' Liability Act.** In determining when an employe is engaged in interstate commerce under the Federal Employers' Liability Act, some courts have been led into error by following federal decisions construing the Federal Safety Appliance Act. Such decisions may or may not be applicable, depending altogether whether they were construing that act as it was before the amendment of 1903 or since. Prior to the 1903 amendment to the Safety Appliance Act, it was necessary for the plaintiff to prove in order to recover for an injury due to a violation of that law, that the car having a defect, was at the time of the injury "hauled or permitted to be hauled or used on its line in moving interstate traffic." Decisions construing the act as it thus read would no doubt throw light on similar questions under the liability act.

But since the amendment of 1903, the Federal Safety Appliance Act is very much broader than the Employers' Liability Act for by that amendment every interstate railroad is required to equip all its cars as provided by the safety act whether used in intrastate or interstate commerce.<sup>54</sup> This broad exercise of power extending

54. **United States.** *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; *United States v. Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, 35 Sup. Ct. 634; *United States v. Erie R. Co.*, 237 U. S. 402, 59 L. Ed. 1019, 35 Sup. Ct. 621; *Southern R. Co. v. Railroad Commission of Indiana*, 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. 304;

*United States v. Pere Marquette R. Co.*, 211 Fed. 220; *United States v. International & G. N. R. Co.*, 98 C. C. A. 392, 174 Fed. 638; *Wabash R. Co. v. United States*, 93 C. C. A. 393, 168 Fed. 1. **Illinois.** *Devine v. Chicago & C. River R. Co.*, 259 Ill. 449, 102 N. E. 803.

**Iowa.** *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa 566, 148 N. W. 128.

**Kansas.** *Thornbro v. Kansas City, M. & O. R. Co.*, 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.

**Minnesota.** *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005; *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300.



the Safety Appliance Act to all cars on interstate highways by railroad has been sustained by the national Supreme Court.<sup>55</sup> As practically all railroads in the United States are interstate highways, the Safety Appliance Act applies to all cars on such railroads.

The decisions cited in the notes, holding that even cars used in intrastate commerce are included within the provisions of the Safety Appliance Act, have sometimes been cited as throwing light on the proposition as to when an employe is engaged in interstate commerce under the Federal Employers' Liability Act. Such decisions are not applicable; for if an employe is injured while working on cars hauling only intrastate traffic on an interstate railroad due to any violation of the Federal Safety Appliance Act, he has his remedy under that statute although he was not engaged at the time in interstate commerce.<sup>56</sup> "In many cases it is difficult," said the court in *Boyle v. Pennsylvania R. Co.*,<sup>57</sup> "to find the line distinguishing intrastate and interstate commerce; nevertheless the line exists. It is the function of the

**South Carolina.** *Lorick v. Seaboard Air Line Ry. Co.*, 102 S. C. 276, Ann. Cas. 1917D 920, 86 S. E. 675.

**Texas.** *State v. Beaumont & G. N. R. Co.*, — Tex. Civ. App. —, 183 S. W. 120; *State v. Orange & N. W. Ry. Co.*, — Tex. Civ. App. —, 181 S. W. 494.

The Federal Safety Appliance Act embraces all cars used on any railroad that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not. *Ewing v. Coal & Coke Ry. Co.*, — W. Va. —, 96 S. E. 73.

55. *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822; *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa 566, 148 N.

W. 128.

56. *Southern Ry. Co. v. United States*, 222 U. S. 20, 56 L. Ed. 72, 32 Sup. Ct. 2, 3 N. C. C. A. 822.

"The cause of action stated in the petition does not seem to be one based upon a violation of the Safety Appliance Act. If it were, then, since clearly the car was used 'on a railroad engaged in interstate commerce' as provided in the amendment of March 2, 1903, to the Safety Appliance Act, it would not matter whether plaintiff was or was not engaged in interstate commerce at the very moment of his injury. Roberts on Injuries to Interstate Employes, paragraph 50, p. 119." *Trowbridge v. Kansas City & W. B. Ry. Co.*, 192 Mo. App. 52, 179 S. W. 777.

57. 142 C. C. A. 558, 228 Fed. 266.

courts to maintain the line of distinction and to promulgate rules by which it may be found. We are urged in this case, however, to advance a principle which would not aid in discovering the line of distinction between the two kinds of commerce, but, we conceive, would obliterate it. We are urged to this position upon authority of the decisions under the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1913, secs. 8605-8612) with which it has been said the Employers' Liability Act is in *pari materia*. Under the Safety Appliance Act, all cars of an interstate railroad, in whatever kind of commerce used, are required to be equipped with safety appliances, upon the theory that such universal equipment is necessary to the safety of interstate traffic. It has therefore been held in *Southern Ry. Co. v. United States*, 222 U. S. 20, 26, 27, 32 Sup. Ct. 2, 56 L. Ed. 72, that a car used for intrastate traffic only, when hauled over tracks used for interstate traffic, is within the Safety Appliance Act. In the *Second Employers' Liability Act Cases*, 223 U. S. 1, 51, 52, 32 Sup. Ct. 169, 176 (56 L. Ed. 327, 38 L. R. A. (N. S.) 44), it was held that: 'It is not a valid objection that the act embraces instances where the causal negligence is that of an employe engaged in intrastate commerce; for such negligence, when operating injuriously upon an employe engaged in interstate commerce, has the same effect upon that commerce as if the negligent employe were also engaged therein.' Relying upon this expression and the Safety Appliance Act decision, last cited, the plaintiff in error urges the contention that the effect of inspection of an intrastate train is so immediately and necessarily related to the safe movement of interstate commerce as to be a part of it. We are of opinion that the decision cited under the Safety Appliance Act may be considered as a logical interpretation of the means intended by Congress to effect and obtain the safety to interstate commerce contemplated by the Safety Appliance Act. The decision in the *Second Employers' Liability Cases*, *supra*, to the extent in which it was cited, dealt only with the liability of employers for injuries to their em-

ployes, and related only to the matter of injuries sustained by an employe in interstate commerce, occasioned by an employe in intrastate commerce. Neither case is authority for the contention so broadly made, that acts which are primarily intrastate, become interstate in their nature when they affect the safety or movement of interstate commerce. While the movement of an intrastate train, like the use of an intrastate instrument, may in some measure affect the safe movement of interstate commerce, we believe that in the present case, the inspection of such an intrastate train is so remotely related to interstate commerce that under the tests prescribed by the Supreme Court it cannot be considered a part of it."

Although the amendatory statute, placing all cars used on interstate railroads, including cars used thereon in intrastate traffic, was passed in 1903, the supreme court of Pennsylvania in 1915 erroneously held that the Federal Safety Appliance Act was not applicable unless the car was used in moving interstate traffic.<sup>58</sup>

**§ 463. Instances where Employes were Engaged in Interstate Commerce but Erroneously Held to Have Been Engaged in Intrastate Commerce.** Since the numerous decisions of the federal Supreme Court construing the clause "while he is employed by such carrier in such commerce," found in the first section of the act have been delivered the uncertainty as to when railroad employes are engaged in interstate commerce has been, to a large extent, removed, and decisions in conflict with the rulings of the Supreme Court are erroneous, for it is the final arbiter as to when a railroad servant is employed in that commerce within the control of the federal government. A few of these erroneous decisions will now be briefly reviewed.

A Georgia Court of Appeals held<sup>59</sup> that a member of a track gang repairing a track on a railroad carry-

58. *Moyer v. Pennsylvania R. Co.*, 247 Pa. 210, 93 Atl. 282.

59. *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. App. 322, 73 S. E. 551.



ing both intrastate and interstate commerce, was not engaged in interstate commerce, but this decision is contrary to the ruling of the Supreme Court in the *Pedersen* case.<sup>60</sup> A New Jersey court held<sup>61</sup> that an employe unloading new rails with which the track was to be repaired, was not engaged in interstate commerce; but assuming that the proof in that case developed that which is true of practically every railroad in the United States, that interstate and intrastate commerce were carried over the track indiscriminately, the court's ruling was wrong.<sup>62</sup> The same court, in a later case, held that an employe was engaged in intrastate commerce when he was clearly, under the facts, engaged in interstate commerce.<sup>63</sup> The plaintiff in the *Granger* case was injured while placing a cover over the mechanism of a switch which he had just oiled. The switch connected two lines of track, one used for freight and the other for passenger trains for either interstate or intrastate business, as the necessities of the railroad company required. While so engaged, the plaintiff was struck by a car which was not, at the time, being used for the transportation of freight, nor did it appear that the movement of the car had any relation to the making of a train for the purpose of engaging in interstate commerce. It was held that the plaintiff's cause of action was not governed by the federal act and that he was not engaged in interstate commerce. This ruling was erroneous for the reason that the switch on which the plaintiff was working had a direct and immediate connection with interstate commerce. The question whether the car was being used in interstate commerce was entirely immaterial for the reason that the federal act includes the causal negligence of agencies wholly used in intrastate commerce.<sup>64</sup>

60. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153.

61. *Pierson v. New York, S. & W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233.

62. Section 478, *infra*.

63. *Granger v. Pennsylvania R. Co.*, 84 N. J. L. 338, 86 Atl. 264.

64. *In re Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832.



A federal district court held that a carpenter working on a railroad bridge on a track carrying both kinds of commerce, was not engaged in interstate commerce within the meaning of the federal Employers' Liability Act;<sup>65</sup> but this case has long since been overruled.<sup>66</sup> The supreme court of Nebraska decided that an engineer running a "light" engine between two points in that state, which, defendant claimed, was ultimately destined to a point in another state, was not engaged in interstate commerce.<sup>67</sup> But a contrary conclusion was reached by the federal Supreme Court in the same case.<sup>68</sup>

65. *Taylor v. Southern Ry. Co.*, 178 Fed. 380.

66. Section 469, *infra*.

67. *Wright v. Chicago, R. I. & P. R. Co.*, 94 Neb. 317, 143 N. W. 220.

68. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185, in which Mr. Justice Van Devanter said: "It is entirely clear that taking the road engine from Phillipsburg, Kansas, to Council Bluffs, Iowa, was an act of interstate commerce, and that the interstate, while participating in that act, was employed in such commerce. That the engine was not in commercial use but merely on the way to a repair shop is immaterial. It was being taken from one State to another and this was the true test of whether it was moving in interstate commerce. See *North Carolina R. R. v. Zachary*, 232 U. S. 248, 259. The courts of the State rested their decision to the contrary upon the train order under which the interstate was proceeding and upon the decisions in *Chicago & Northwestern Ry. v. United States*, 168 Fed. Rep. 236, and *United States v. Rio Grande Western Ry.*, 174 Fed. Rep. 399. In this they misconceived the

meaning of the train order and the effect of the decisions cited. The order was given by a division train dispatcher and meant that between the points named therein the engine would have the status of an extra train, and not that it was going merely from one of those points to the other. The cases cited arose under the Safety Appliance Acts of Congress and what was decided was that those acts were not intended to penalize a carrier for hauling to an adjacent and convenient place of repair a car with defective appliances, when the sole purpose of the movement was to have the defect corrected, and the car was hauled alone and not in connection with other cars in commercial use. It was not held or suggested that such a hauling from one State to another was not a movement in interstate commerce, but only that it was not penalized by those acts. As the injuries resulting in the interstate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the Employers' Liability Act of Congress."

**§ 464. Instances Where Employes Were Engaged Exclusively in Intrastate Commerce but Erroneously Held to have been Engaged in Interstate Commerce.**

In the cases discussed in the preceding paragraph the courts erroneously held that the employes were engaged in intrastate commerce. There are other cases where employes were engaged exclusively in intrastate commerce but were erroneously held by the courts to have been engaged in interstate commerce. The supreme court of Oregon decided that a member of a switching crew while coupling a switch engine to a private car used wholly within the state in intrastate commerce and injured while so working, was employed in interstate commerce. The proof, however, disclosed that the switching crew was engaged indiscriminately in moving cars containing both intrastate and interstate commerce but at the time of receiving the injury they were engaged solely in moving the intrastate car mentioned.<sup>69</sup> Although the decision in this case was handed down after the opinion of the Supreme Court of the United States in the Behrens case,<sup>70</sup> that case was not called to the attention of the court and no doubt a different conclusion would have been reached had the court considered the facts in the light of the ruling in the Behrens case.

The supreme court of Minnesota held that a freight conductor was engaged in interstate commerce when under the facts it seems that he was engaged in intrastate commerce.<sup>71</sup> The evidence in that case disclosed that the injured conductor was generally employed in interstate commerce. But at the time he was injured in a head-end collision the train did not contain any interstate commerce and was moving between two points in the same state. At the time of the accident he had in his train the engine, way car and also another dis-

69. *Oberlin v. Oregon-Washington R. & Nav. Co.*, 71 Ore. 177, 142 Pac. 554.

70. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C.

A. 153, Ann. Cas. 1914C 163.

71. *Peery v. Illinois Cent. R. Co.*, 123 Minn. 264, 143 N. W. 724; s. c., 128 Minn. 119, 150 N. W. 382, 1103.

abled locomotive. No facts appeared as to the use of the disabled locomotive. Under these circumstances the conductor is presumed to have been engaged in intrastate commerce,<sup>72</sup> and on writ of error to the United States Supreme Court, it was held that Peery was not, under the circumstances, engaged in interstate commerce for the reason that his train was handling no interstate traffic at the time.<sup>73</sup> In another case a federal district court held that a switching crew generally engaged in moving interstate commerce but at the time employed in moving intrastate commerce solely, was engaged in interstate commerce within the meaning of the federal act,<sup>74</sup> but this case was reversed when it reached the Supreme Court of the United States.

**§ 465. Burden of Proving Interstate Employment is Upon the Plaintiff.** In all actions for damages against common carriers by railroad under the Federal Employers' Liability Act, the burden of proving that the plaintiff or the decedent was, at the time of the injury or death, employed in interstate commerce and that the carrier was also engaged in commerce among the states, is upon the plaintiff.<sup>75</sup>

72. Section 453, *supra*.

73. Illinois Cent. R. Co. v. Peery, 242 U. S. 292, 61 L. Ed. 309, 37 Sup. Ct. 122.

74. Behrens v. Illinois Cent. R. Co., 192 Fed. 581.

75. United States. Osborne v. Gray, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; Southern R. Co. v. Lloyd, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; Lucchetti v. Philadelphia & R. Ry. Co., 233 Fed. 137.

Alabama. Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611.

Indiana. Cincinnati, H. & D. Ry. Co. v. Gross, — Ind. App. —, 111 N. E. 653.

Kansas. Cole v. Atchison, T. & S. F. R. Co., 97 Kan. 461, 155 Pac.

949.

Maryland. Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225.

Minnesota. Hurley v. Illinois Cent. R. Co., 133 Minn. 101, 157 N. W. 1005, citing Roberts, Injuries to Interstate Employees.

New York. Knowles v. New York, N. H. & H. R. Co., 164 N. Y. App. Div. 711, 150 N. Y. Supp. 99.

Pennsylvania. Hench v. Pennsylvania R. Co., 246 Pa. 1, L. R. A. 1915D 557, Ann. Cas. 1916D 230, 91 Atl. 1056.

Washington. Tsmura v. Great Northern R. Co., 58 Wash. 316, 103 Pac. 774.

West Virginia. Easter v. Virginian R. Co., 76 W. Va. 383, 11

§ 466. **Burden of Proving Interstate Employment upon Defendant, When.** When an employe of a common carrier by railroad prosecutes an action for personal injuries and predicates a right of recovery upon the laws of a state or the common law, and the defendant seeks to prevent a recovery under the state law by showing that the federal act controls, it has the burden of proving that the employe was engaged in interstate commerce at the time of the injury.<sup>76</sup>

N. C. C. A. 101, 86 S. E. 37.

76. *Zavitovsky v. Chicago, M.*

*Wisconsin. Zavitosky v. Chi-* & *St. P. R. Co.*, 161 Wis. 461, 154  
*cago, M. & St. P. R. Co.*, 161 Wis. N. W. 974.  
461, 154 N. W. 974.



## CHAPTER XXIV

### EMPLOYEES ENGAGED IN CONSTRUCTION AND REPAIR WORK.

- Sec. 467. Employees Engaged in Construction of Instrumentalities for Future Use in Interstate Commerce.
- Sec. 468. Distinction between Original Construction Work and Repair or Maintenance of Interstate Highways by Rail.
- Sec. 469. Bridges Workers and Carpenters Employed in Interstate Commerce, When.
- Sec. 470. Far Reaching Effect of Pedersen case in Extending National Control over Railroad Employees.
- Sec. 471. Erecting Foundation for New Bridges under Old Bridges Forming Parts of Interstate Lines.
- Sec. 472. Removing Bolts from Timbers after Having Been Taken Out of Interstate Bridges.
- Sec. 473. Repairing Tracks of Interstate Carriers—Section Men and Track Laborers.
- Sec. 474. Status of Laborers Repairing Side Tracks, Spur Tracks and Switches.
- Sec. 475. Maintenance and Repair of Turntables on Interstate Railroads.
- Sec. 476. Clearing Debris from Interstate Lines after Wrecks and Constructing Temporary Tracks.
- Sec. 477. Employees Surveying Track to Improve Condition of Roadbed.
- Sec. 478. Employees Handling Rails on Tracks of Interstate Carriers.
- Sec. 479. Picking up Old Rails and Storing New Ones Along Track for Future Use.
- Sec. 480. When Laborers Handling Ties for Common Carriers are Under the Federal Act.
- Sec. 481. Employees Handling Ballast, Gravel, Sand, Etc., for Use in Repairing Interstate Tracks.
- Sec. 482. Excavating and Deepening Ditches Along Railroad Tracks for Drainage Purposes.
- Sec. 483. Repairing or Rebuilding Depots, Roundhouses, Sheds, etc. not Employment in Interstate Commerce.
- Sec. 484. Employees Working in Machine and Repair Shops, Roundhouses and Other Like Buildings.
- Sec. 485. Earlier Decisions Overruled by Rulings of National Supreme Court Cited in Two Foregoing Paragraphs.
- Sec. 486. When Car and Engine Repairers are Employed in Interstate Commerce.
- Sec. 487. Employees Repairing Engines and Cars in Transit or Temporarily Delayed.
- Sec. 488. Status of Shopmen Repairing Empty Cars in Terminal Yards and Engines in Roundhouses.

- Sec. 489. Subsequent Cases Applying the Doctrine of the Winters Case to Car and Engine Repairers.
- Sec. 490. Differentiating Factors Between Rulings in Winters and Pedersen Cases.
- Sec. 491. Illustrative Cases in which Car and Engine Repairs were not Employed in Interstate Commerce.
- Sec. 492. Repairing Cars and Engines Used Exclusively in Interstate Commerce.
- Sec. 493. Interstate Status of Employes Painting Instrumentalities of Commerce Among the States.
- Sec. 494. Linemen Repairing Telegraph and Telephone Lines of Interstate Carriers.

**§ 467. Employes Engaged in Construction of Instrumentalities for Future Use in Interstate Commerce.** Employes assisting in the original construction of tracks, tunnels, bridges, buildings, telegraph lines, engines or cars which have never been used as instrumentalities of interstate commerce, are not employed in interstate commerce within the meaning of the statute.<sup>1</sup> An interstate

1. **United States.** New York Cent. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, 37 Sup. Ct. 247, 13 N. C. C. A. 943, L. R. A. 1917D 1, Ann. Cas. 1917D 629; Raymond v. Chicago, M. & St. P. R. Co., 243 U. S. 43, 61 L. Ed. 583, 37 Sup. Ct. 268; Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127; Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779; Ann. Cas. 1914C 153, rev'g 117 C. C. A. 33, 197 Fed. 537, which aff'd 184 Fed. 737; Raymond v. Chicago, M. & St. P. R. Co., 147 C. C. A. 245, 233 Fed. 239; Canadian Pac. R. Co. v. Thompson, 146 C. C. A. 401, 232 Fed. 253; Bravis v. Chicago, M. & St. P. R. Co., 133 C. C. A. 228, 217 Fed. 234.

**Alabama.** Louisville & N. R. Co. v. Carter, 195 Ala. 382, Ann. Cas. 1917E 292, 70 So. 655.

**Arkansas.** Long v. Biddle, 124

Ark. 127, 186 S. W. 601.

**Indiana.** Chicago & E. R. Co. v. Steele, 183 Ind. 444, 108 N. E. 4.

**Iowa.** Ross v. Sheldon, 176 Iowa 618, 154 N. W. 499; Clark v. Chicago Great Western R. Co., 170 Iowa 452, 152 N. W. 635.

**Kentucky.** Young v. Norfolk & W. R. Co., 171 Ky. 510, 188 S. W. 621; Thompson v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256, Ann. Cas. 1917A 1266, 176 S. W. 1006.

**Michigan.** Collins v. Michigan Cent. R. Co., 193 Mich. 303, 159 N. W. 535.

**Missouri.** Voris v. Chicago, M. & St. P. R. Co., 172 Mo. App. 125, 157 S. W. 835.

**Oklahoma.** Ft. Smith & W. R. Co. v. Blevins, 35 Okla. 378, 130 Pac. 525.

**Pennsylvania.** Glunt v. Pennsylvania R. Co., 249 Pa. 522, 95 Atl. 109.

**Texas.** Chicago, R. I. & G. Ry. Co. v. Trout, — Tex. Civ. App. —, 152 S. W. 1137.

railroad company was constructing a "cut-off" so as to shorten a route used by it which, when completed, would have been used for hauling interstate commerce. A teamster was engaged in driving a horse which pulled cars filled with dirt and rock along the track out of a tunnel which was a part of the "cut-off" line. He was not engaged in interstate commerce and the mere fact that the line, when completed, would be used in transporting interstate commerce, would make no difference.<sup>2</sup> In that case the court said: "Stripped of the conclusions in the complaint, we have the fact that the defendant is engaged in constructing a 'cut-off' on its line of road so as to shorten the route used by it now and eliminate some of the inconveniences, and possible expense, in the operation of the line at the present time. There is no statement that this line, upon which the work is being performed, is now used, but the complaint in paragraph 3 says, 'and through which, when completed, the interstate commerce \* \* \* will be routed.' The plaintiff was not himself engaged upon any interstate commerce, nor was he injured by any one connected with the operation of any of the agencies which actually transported interstate commerce. The building of this cut-off is a facility which is to be used by the defendant, when completed, as an engine or cars, or any other appliance under construction might be considered for use when completed. Can it be said that a person engaged in the building of engines or cars, or any other facilities to be used by a common carrier engaged in interstate commerce, comes within the provisions of the Employers' Liability Act? The act deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. Second Employers' Liability Cases, 223 U.

West Virginia. *McKee v. Ohio Valley Elec. R. Co.*, 78 W. Va. 131, 88 S. E. 616.

Wisconsin. *Sullivan v. Chicago, M & St. P. R. Co.*, 163 Wis. 583, 158 N. W. 321.

2. *Jackson v. Chicago, M. & St. P. Ry. Co.*, 210 Fed. 495. See dissenting opinion in *Grow v. Oregon Short Line R. Co.*, 44 Utah 160, Ann. Cas. 1915B 481, 138 Pac. 398.

S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. The act is not 'concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities, and during their use as such.' *Pedersen v. Del., Lack. & West. R. R.*, 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125. The language of the complaint, 'when completed, the interstate commerce \* \* \* will be routed' through the tunnel, conclusively shows that it is not now so employed; hence the act cannot apply, and Supreme Court decisions *supra* are decisive. Tested by the requirements of the act, I do not think that the tunnel was used as an appliance in transporting interstate commerce, nor was the plaintiff employed in such commerce. All of the cases cited, I think, are in harmony with this conclusion." An employe, assisting in the construction of a second track along an existing track so that, when completed, the railroad company might have a double, instead of, a single track railway, was held to be engaged in original construction work and therefore not within the federal act.<sup>3</sup> In *Chrosciel v. New York Cent. & River R. Co.*,<sup>4</sup> the court held that a machine drill runner drilling holes in a concrete wall, being a part of his employment in constructing a new terminal station for an interstate carrier, was employed in interstate commerce within the meaning of the Federal Act; but the decision of the court is palpably erroneous.

3. *Chicago & E. R. Co. v. Steele*, 183 Ind. 444, 108 N. E. 4, where in the court said: "Appellee was one of a train crew employed on a work train engaged in hauling railroad ties for distribution along the right of way, which ties were intended to be used on the grade of the proposed second track. The grade was not then finished. The work train moved along the rails of the existing track, which

was then used in interstate commerce, and the ties were thrown to the side along the line of the new grade. The operation of the work train was wholly in this state, and no part of the proposed track had been used for any purpose, but when the same might have been completed it was intended by appellant to use the same in interstate commerce."

4. 174 N. Y. App. Div. 175, 159 N. Y. Supp. 924.



§ 468. **Distinction between Original Construction Work and Repair or Maintenance of Interstate Highways by Rail.** The distinction between original construction work and the repair or maintenance of interstate highways by rail is important under the statute, as an employe engaged in the former must look to the laws of the state while, if employed in the latter, the federal act governs. The line of demarcation between the two fields of employment was well stated by Judge Evans of the Iowa Supreme Court, as follows: "The contention of the appellant is that the work in which the decedent was engaged was not *repair* or *maintenance* work, but was new *construction work*. That there may be a distinction between repair work and construction work is recognized in the Pedersen Case, *supra*. The argument for appellant is that the line and instrumentalities of the defendant were complete, and, as such, in *repair* without the addition of new cross-arms, and without the proposed addition of new wires, and without the proposed 'automatic' system; that, while the automatic system was proposed to be used upon the line (and therefore in interstate commerce), it had not yet been thus used. The line of demarcation between repair work, on one hand, and construction work, on the other, is not always easily discernible. Repair often, if not usually, involves more or less construction and substitution. It likewise involves betterment and improvement. The recent decisions of the Supreme Court are, in effect, declaring the rules of construction which shall guide all the courts and litigants in determining whether the facts in a given case bring it within the federal act. It is highly desirable that such rules attain as great a degree of certainty as practicable, and such is the manifest aim of the high court. To such end the distinction between 'repair' and 'construction' work must not be drawn too fine. The trend of the cases thus far decided indicate that labor and betterment upon an interstate line of railway will not be deemed as new construction work unless it is clearly such. That is to say, mere doubt will be resolved in favor of

'repair and maintenance.' The substitution of a 90-pound rail for a 60-pound rail partakes of the nature both of repair and construction; likewise the substitution of *five* wires for one or the addition of *four* wires to *one*. In the case before us the new cross-arms were attached to the old poles. They were intended for the support of the old wire and others. They were not an independent construction. They could not stand alone. They had no function to perform, except as a part of the electrical system of the defendant railway, which system was in actual operation at the time of the injury.'"<sup>5</sup>

**§ 469. Bridge Workers and Carpenters Employed in Interstate Commerce, When.** If the railroad tracks of a common carrier are used indiscriminately for the purpose of carrying both interstate and intrastate commerce, then bridge workers, painters and carpenters employed on such tracks are engaged in interstate commerce within the meaning of the federal act.<sup>6</sup> The Peder-

5. *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499, in which the court held that a lineman, while working for an interurban electric railroad and installing an automatic signal system as a substitute for a "hand system," was engaged in repair work within the meaning of the act. To the same effect: *Glunt v. Pennsylvania R. Co.*, 249 Pa. 522, 95 Atl. 109.

6. **United States.** *Norfolk & W. R. Co. v. Holbrook*, 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143, 7 N. C. C. A. 814; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 194C, 153, rev'g 184 Fed. 737 and 117 C. C. A. 33, 197 Fed. 537. (Lamar, Holmes and Lurton, J. J., dissenting); *Grand Trunk R. Co. of Canada v. Knapp*, 147 C. C. A.

624, 233 Fed. 950, 13 N. C. C. A. 1100; *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604; *Norfolk & W. R. Co. v. Holbrook*, 131 C. C. A. 621, 215 Fed. 687; *Thomson v. Columbia & P. S. R. Co.*, 205 Fed. 203, 4 N. C. C. A. 925.

**Alabama.** *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960.

**Arkansas.** *Long v. Biddle*, 124 Ark. 127, 186 S. W. 601.

**Kansas.** *Spinden v. Atchison, T. & S. F. R. Co.*, 95 Kan. 474, 148 Pac. 747.

**Kentucky.** *Louisville & N. R. Co. v. Netherton*, 175 Ky. 159, 193 S. W. 1035; *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209, 172 S. W. 517.

**Missouri.** *McIntosh v. St. Louis & S. F. Co.*, 182 Mo. App. 288, 168 S. W. 821.

sen case, cited in the notes, was one of the first and leading cases before the Supreme Court of the United States presenting the question as to when a railroad employe was engaged in interstate commerce by virtue of his employment and the court held that an iron worker employed in repairing a bridge on a railroad track, used indiscriminately for both interstate and intrastate commerce, was engaged in interstate commerce while he was carrying bolts or rivets from a tool car to the bridge although struck by a train carrying exclusively intrastate commerce. When struck, the plaintiff was not engaged in removing the old girder and inserting the new one but was merely carrying to the place some of the materials to be used there. These facts were presented to three courts and three different conclusions of law were drawn from them. In the final decision of the national Supreme Court, Justices Lamar, Holmes and Lurton dissented. The federal circuit court in which the case was tried held that an injury resulting from a co-employe engaged in intrastate commerce, was not within the terms of the act. The federal circuit court of appeals disapproved the ruling of the lower court but decided that the plaintiff was not engaged in interstate commerce. The Supreme Court disapproved both rulings and held that it was not essential where the causal negligence was that of a co-employe that he must also be employed in interstate commerce "for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence of *any* of the \* \* \* employes of such carrier" and this in-

**Minnesota.** *Marshall v. Chicago, R. I. & P. R. Co.*, 131 Minn. 392, 155 N. W. 208.

**Oklahoma.** *Ft. Smith & W. R. Co. v. Holcombé*, — Okla. —, 158 Pac. 633.

**South Carolina.** *Camp v. Atlanta & C. A. L. R. Co.*, 100 S. C. 294, 84 S. E. 825.

**Washington.** *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 5 N. C.

C. A. 947, 140 Pac. 685.

A bridge carpenter, injured while acting as a member of a crew in charge of a work train on which was a pile driver, service water tank, etc., on the way to repair a railway bridge used for the passage of interstate traffic, was engaged in interstate commerce. *Grand Trunk Ry. Co. of Canada v. Knapp*, *supra*.



cludes an employe engaged in intrastate commerce.” On this feature all the judges concurred. The court also held that the plaintiff was employed in interstate commerce, because the work of keeping bridges in repair is so closely related to interstate commerce as to be in practice and legal contemplation a part of it. Tried by the true test, is the work in question a part of the interstate commerce in which the carrier is engaged, the court found that bridges on interstate railroads, are as indispensable to such commerce as cars and engines, and that the security and efficiency of such commerce requires such bridges to be kept in repair. In the minority opinion, Justice Lamar held that carrying bolts to be used in repairing such a bridge was not a part of commerce but an incident which precedes it; that such an act was not commerce in any sense and that the Federal Employers’ Liability Act applied to those engaged in transportation and not to those employed in building, manufacturing or repairing. In holding that the plaintiff was engaged in interstate commerce, Mr. Justice Van Devanter, speaking for the court in the majority opinion, said: “That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now



before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency \* \* \* in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair which thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See *McCall v. California*, 136 U. S. 104, 109, 111, 34 L. Ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)*, 223 U. S. 6, 59, 56 L. Ed. 329, 350 (1 N. C. C. A. 875), 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169; *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893, 897, 898 (3 N. C. C. A. 783n, 784); *Central R. Co. v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901 (4 N. C. C. A. 645); *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665; *Northern P. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce. The point is made that the plaintiff was not, at the time of

his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

**§ 470. Far Reaching Effect of Pedersen Case in Extending National Control over Railroad Employees.** The decision of the national Supreme Court in the Pedersen case, discussed in the foregoing paragraph, stands as a landmark in the extension of federal control and the elimination of state authority over railroad employees. The specific point at issue was the simple question whether the carrying of a bolt from a tool car to a bridge on an interstate highway by rail was employment in interstate commerce; but the affirmative answer to the question by the court with the "last guess" in effect, transferred thousands of railroad employees from the control of state laws to the domain of the rights and liabilities created by the national statute. By the principles adopted in this case to determine employment in interstate commerce, all laborers in the United States repairing or working upon highways of interstate commerce by rail, including bridges, switches, trestles, tracks and roadbeds became immune from the dominion of state laws in so far as their rights for injuries were concerned.

**§ 471. Erecting Foundation for New Bridges under Old Bridges Forming Parts of Interstate Lines.** A conflict of opinion has arisen among state courts as to the interstate status of employees erecting and building foundations for new bridges under old bridges constituting parts of interstate highways by rail when employed on such new bridges before they have become a part of or attached to the tracks above them. In one case it was

held that an employe injured while excavating under a wooden trestle bridge which was a part of the main line, for the purpose of placing thereunder a pier for a new steel bridge which was to take the place of the old wooden trestle then used, was engaged in original construction work and not the repair of an interstate line so as to be engaged in interstate commerce.<sup>7</sup> A Washington court, on the other hand, held that an employe doing quite similar work was engaged in interstate commerce.<sup>8</sup> In the *Bates* case it appeared that concrete piers were being built under a wooden bridge. The piers were eventually to be used as a foundation for a new bridge for a wooden bridge then being used. The wooden bridge was continuously used for carrying interstate commerce while the concrete piers were being built underneath it. When the piers were finished, some time after the accident, the wooden bridge rested upon them. An employe engaged in building the concrete piers before being attached to, or becoming a part of, the bridge, was held to be engaged in interstate commerce.

**§ 472. Removing Bolts from Timbers after Having Been Taken out of Interstate Bridges.** Employes engaged in removing bolts from timbers which had con-

7. *McKee v. Ohio Valley Elec. R. Co.*, 78 W. Va. 131, 88 S. E. 616.

A laborer employed in constructing a dirt fill beneath a wooden trestle supporting an interstate track, which fill, when completed, was to be used to support the track instead of the trestle bridge, it was held, could not maintain an action under the Federal act. *Kinzell v. Chicago, M. & St. P. Ry. Co.*, — Idaho —, 171 Pac. 1136. At the time Kinzell was injured, the fill had progressed to the extent that it had in places reached the railroad ties and it became necessary to spread the dirt away from the track and thereby widen the fill.

Under these circumstances, it seems that Kinzell's connection with interstate commerce was sufficiently close to place him within the protection of the Federal act. The correctness of the ruling is exceedingly doubtful.

A section man employed in putting ties and other rubbish into a "fill" for the purpose of strengthening and making the track of an interstate line safer, was engaged in interstate commerce. *Ohio Valley E. Ry. Co. v. Brumfield*, — Ky. —, 203 S. W. 541.

8. *State v. Bates & Rogers Const. Co.*, 91 Wash. 181, 157 Pac. 482.



stituted a part of a bridge on an interstate line, are under the protection of the federal act, although the timbers had been removed and were lying on the side of the railroad road-bed clear of passing trains.<sup>9</sup> In the cited case, an employe was a bridge repairer. At the time of his death, his duties consisted in removing drift bolts from the bridge timbers so that the timbers might be carried away and used in other bridges. "Counsel point to the fact that the caps or bents had been removed from the bridge," said the court, "and were lying by the side of the dump far enough to be clear of passing trains. For this reason they insist that the employe was through with constructing the bridge, and that the work he was engaged in at the time of his injury was not a part of interstate commerce. It must be admitted that this is a border-line case, but when tested by the rule already laid down by the Supreme Court of the United States, we think the employe was employed in interstate commerce at the time he received his injuries. It will be remembered that when the timbers taken from the bridge are old and worthless they are piled up and burned. When they are sound enough to be used again the bolts are removed from them and they are piled up on the right of way and thereafter carried to the place where they are to be again used. It is not sufficient that they should be moved far enough away from the track so that they would not be struck by passing trains. The work of constructing and repairing the bridge would not be accomplished by removing the bridge timbers only this far. Their presence so near the track would not only be a constant source of danger to the employes engaged in operating trains, and the traveling public, but would also materially hinder the employes in operating the train. The engineer is required to keep a constant lookout, and would be frequently at a loss to know whether the logs lying so near the track were obstructions on the track or not. Again it will be readily seen that when the timbers became dry and rotten they would easily catch fire from the passing

9. Long v. Biddle, 124 Ark. 127, 186 S. W. 601.



trains and the fire thus put out would endanger the bridges and tracks near which they were piled. Many other reasons readily suggest themselves why it would be dangerous to leave these timbers so near the track. We think it was a part of the work of constructing the bridge to remove the timbers a safe distance away from the track after they were taken from the bridge, and that a part of this work consisted in drawing bolts out of the timber so that they might be more easily stacked and made ready for shipment. Therefore we are of the opinion that the deceased was employed in interstate commerce at the time he was injured, and the plaintiff is not entitled to recover."

**§ 473. Repairing Tracks of Interstate Carriers—Section men and Track Laborers.** All section men and track laborers while working on or repairing any part of the track or switches used by a common carrier by railroad, indiscriminately, for both interstate and intrastate commerce, are employed in interstate commerce within the meaning of the national statute.<sup>10</sup> For in-

10. **United States.** New York Cent. R. Co. v. Winfield, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546; St. Joseph & G. I. R. Co. v. United States, 146 C. C. A. 397, 232 Fed. 349; Philadelphia, B. & W. R. Co. v. McConnell, 142 C. C. A. 555, 228 Fed. 263; Columbia & P. S. R. Co. v. Sauter, 139 C. C. A. 150, 223 Fed. 604; Lombardo v. Boston & M. R. R., 223 Fed. 427; Tralich v. Chicago, M. & St. P. Ry. Co., 217 Fed. 675; San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870; Central R. Co. of New Jersey v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Zikos v. Oregon R. & Nav. Co., 179 Fed. 893.

**Arkansas.** Treadway v. St. Louis, I. M. & S. R. Co., 127 Ark. 211, 191 S. W. 930.

**California.** Southern Pac. Co. v. Industrial Acc. Commission of

California, 174 Cal. 8, 161 Pac. 1139.

**Colorado.** Denver & R. G. R. Co. v. De Vella, — Colo. —, 165 Pac. 254; Denver & R. G. R. Co. v. Wilson, — Colo. —, 163 Pac. 857.

**Georgia.** Southern R. Co. v. Puckett, 16 Ga. App. 551, 85 S. E. 809; Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558; Charleston & W. C. R. Co. v. Anchors, 10 Ga. App. 322, 73 S. E. 551.

**Indiana.** Grand Trunk Western Ry. Co. v. Thrift Trust Co., — Ind. App. —, 115 N. E. 685; Chicago & E. R. Co. v. Steele, 183 Ind. 444, 108 N. E. 4; Southern R. Co. v. Howerton, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369.

**Iowa.** Clark v. Chicago Great Western R. Co., 170 Iowa 452, 152 N. W. 635.

stance, a section man on an interstate railroad, killed while sweeping snow from the switches at a station between terminals, was held to be engaged in interstate

**Kansas.** *Spinden v. Atchison*, T. & S. F. R. Co., 95 Kan. 474, 148 Pac. 747; *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612.

**Kentucky.** *Louisville & N. R. Co. v. Williams' Adm'r*, 175 Ky. 679, 194 S. W. 920; *Jones v. Southern Ry. in Kentucky*, 175 Ky. 455, 194 S. W. 558; *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690; *Lexington & E. R. Co. v. Smith's Adm'r*, 172 Ky. 117, 188 S. W. 1091; *Cincinnati, N. O. & T. P. R. Co. v. Claybourne's Adm'r*, 169 Ky. 315, 183 S. W. 903; *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Louisville & N. R. Co. v. Parker's Adm'r*, 165 Ky. 658, 177 S. W. 465; *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209, 172 S. W. 517; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471; *Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566, 149 S. W. 951.

**Michigan.** *Salabrin v. Ann Arbor R. Co.*, — Mich. —, 160 N. W. 552; *Holmberg v. Lake Shore & M. S. R. Co.*, 188 Mich. 605, 155 N. W. 504.

**Minnesota.** *Maijala v. Great Northern R. Co.*, 133 Minn. 301, 158 N. W. 430; *Cherpeski v. Great Northern R. Co.*, 128 Minn. 360, 150 N. W. 1091.

**Mississippi.** *Elliott v. Illinois Cent. R. Co.*, 111 Miss. 426, 71 So. 741.

**Missouri.** *Dowell v. Wabash Ry. Co.*, — Mo. App. —, 190 S. W. 939; *Sells v. Atchison, T. & S. F. R. Co.*, 266 Mo. 155, 181 S. W. 106;

*Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

**Montana.** *Sorenson v. Northern Pac. R. Co.*, 53 Mont. 268, 163 Pac. 560.

**New Jersey.** *Armbrecht v. Delaware, L. & W. R. Co.*, — N. J. L. —, 101 Atl. 203; *Willever v. Delaware, L. & W. R. Co.*, 89 N. J. L. 697, 99 Atl. 321; *Willever v. Delaware, L. & W. R. Co.*, 87 N. J. L. 348, 94 Atl. 595; *Coyne v. Pennsylvania R. Co.*, 87 N. J. L. 257, 93 Atl. 595.

**New York.** *Rodgers v. New York Cent. & H. River R. Co.*, 171 N. Y. App. Div. 385, 157 N. Y. Supp. 83; *Bitondo v. New York Cent. & H. River R. Co.*, 163 N. Y. App. Div. 823, 149 N. Y. Supp. 339; *Shanks v. Delaware, L. & W. R. Co.*, 163 N. Y. App. Div. 565, 148 N. Y. Supp. 1034.

**Oregon.** *Evanhoff v. State Industrial Accident Commission*, 78 Ore. 503, 154 Pac. 106.

**Pennsylvania.** *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461.

**Texas.** *Houston, E. & W. T. Ry. Co. v. Samford*, — Tex. Civ. App. —, 181 S. W. 857; *Missouri, K. & T. Ry. Co. of Texas v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543; *Texas & P. Ry. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185.

**Vermont.** *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925; *Lynch's Adm'r v. Central Vermont R. Co.*, 89 Vt. 363, 95 Atl. 683.

**Wisconsin.** *Karras v. Chicago & N. W. R. Co.*, 165 Wis. 578, 162 N. W. 923.

commerce.<sup>11</sup> A member of a track gang engaged in ballasting a railroad track used in transporting freight and passengers between different states was held to be employed in interstate commerce while so engaged.<sup>12</sup> A section hand injured while placing a rail in a side track near a main line over which trains carrying interstate commerce habitually passed, was held to be employed in interstate commerce.<sup>13</sup> A track walker, at the time he was struck and injured by an intrastate train, was repairing a switch on a track used for both intrastate and interstate commerce and he was held to have a remedy under the federal act.<sup>14</sup> A section man while driving spikes on a railroad track on which the railroad company transported interstate commerce was declared to be employed in interstate commerce.<sup>15</sup> A section foreman of a railroad company operating a line which traversed several states and injured through the negligence of trainmen operating a train hauling interstate commerce, was held to have a remedy under the federal act.<sup>16</sup> A railroad employe engaged in relaying rails on a switch track near a station on a main line and over which interstate commerce was carried, was held to have a remedy under the federal act.<sup>17</sup> An employe while riding upon a "speeder" and inspecting a railway line used for both intrastate and interstate commerce, was engaged in interstate commerce.<sup>18</sup>

**§ 474. Status of Laborers Repairing Side Tracks, Spur Tracks and Switches.** The federal act is not confined to employes repairing main and branch lines of railroads. Laborers employed in repairing spur tracks,

11. *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

12. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870.

13. *Jones v. Chesapeake & O. R. Co.*, 149 Ky. 566, 149 S. W. 951.

14. *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832, aff'd in 113 C. C. A. 379, 192 Fed. 901.

15. *Zikos v. Oregon R. & Nav.*

*Co.*, 179 Fed. 893.

16. *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558, overruling, in effect, *Charleston & W. C. R. Co. v. Anchors*, 10 Ga. App. 322, 73 S. E. 551.

17. *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

18. *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

side tracks and switches are engaged in interstate commerce if such tracks are used as adjuncts of interstate lines in storing or transporting cars containing interstate traffic. This rule was applied and an employe was held to have been engaged in interstate commerce while he was repairing a spur track leading from the main track to scales on which cars loaded with freight destined to other states were weighed.<sup>19</sup> And so an employe repairing tracks and switches in a yard used for "breaking up," storing temporarily and "making up" trains which were devoted to interstate as well as to intrastate commerce, was within the national statute.<sup>20</sup> A train-master assisting in unloading gravel along a side track which had been used to store trains bound for points in another state, was employed in interstate commerce.<sup>21</sup> A section foreman making repairs upon a spur track used in both interstate and intrastate commerce was within the protection of the federal act.<sup>22</sup>

**§ 475. Maintenance and Repair of Turntables on Interstate Railroads.** Employes repairing turntables on which engines are turned in entering and leaving roundhouses before and after trips "on the road" are subject to the federal act if the engines so turned are utilized in hauling interstate trains or trains containing both interstate and intrastate freight. The status of such employes is within the principle adopted in the Pedersen case,<sup>23</sup> in which the court held that a carpenter repairing a bridge which was a part of an interstate highway, was engaged in interstate commerce. While employes repairing roundhouses where interstate engines are housed, are not within the terms of the federal act for the reason that the connection of such work it too re-

19. *Dowell v. Wabash Ry. Co.*,  
— Mo. App. —, 190 S. W. 939.  
See Section 430, *supra*.

20. *Willever v. Delaware, L. & W. R. Co.*, 87 N. J. L. 348, 94 Atl. 595.

21. *Clark v. Chicago Great Western R. Co.*, 170 Iowa 452, 152

N. W. 635.

22. *Cherry v. Atlantic Coast Line R. Co.*, — N. C. —, 93 S. E. 783.

23. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153.



mote from interstate transportation, it does not seem that this rule should apply to turntables for such instrumentalities have as close and direct connection with interstate transportation, when used in turning engines pulling interstate cars, as a bridge on a main line. In harmony with this view, it has been held that an employe who was injured by the negligent movement of a locomotive engine while he was repairing a turntable, was employed in interstate commerce.<sup>24</sup>

**§ 476. Clearing Debris From Interstate Lines after Wrecks and Constructing Temporary Tracks.** Employes engaged in clearing a railway line of debris after a wreck so that interstate trains may pass, or constructing temporary tracks around the scene of a wreck for the same purpose, are under the control of the federal act. Thus, a car inspector who was carrying blocks to the scene of a wreck to be used in raising a wrecked car so as to extricate another employe pinned beneath the car, and to clear the tracks of the wreckage, was employed in interstate commerce as it appeared that the track was a part of an interstate line.<sup>25</sup> And a workman, carrying oil for the purpose of oiling the rails at the connection of a main line with a temporary track being constructed around the scene of a wreck so that interstate trains would not be delayed, was engaged in interstate commerce.<sup>26</sup>

24. *Chesapeake & O. R. Co. v. Kornhoff*, 167 Ky. 353, 180 S. W. 523.

25. *Southern R. Co. v. Puckett*, 244 U. S. 571, 61 L. Ed. 1321, 37 Sup. Ct. 703, in which the court said: "The (state) court held that although plaintiff's primary object may have been to rescue his fellow employee, his act nevertheless was the first step in clearing the obstruction from the tracks, to the end that the remaining cars for train No. 75 might be hauled over them; that his work facil-

itated interstate transportation on the railroad, and that consequently he was engaged in interstate commerce when injured. We concur in this view. From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce."

26. *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**§ 477. Employes Surveying Track to Improve Condition of Roadbed.** The principle elucidated in the foregoing paragraphs that the work of keeping in repair the track, roadbed and other instrumentalities of a railroad engaged in interstate commerce is so closely related to interstate commerce as to be in practice and legal contemplation a part of it, extends to the work of surveying and setting stakes with a view of improving a railroad curve by a slight change in the track.<sup>27</sup> "Prior to the day of the accident," said the court in the case, cited, "McGuin had been engaged in the usual track work done by section men. On that day, by direction of the track foreman, he was working with Parati, a road engineer, who was surveying and setting stakes with the view of improving a curve by a slight change in the track. \* \* \* A few minutes before the approach of the train, Parati, the surveyor, had sent McGuin north to a designated point to hold a rod by means of which he intended to take a back sight. McGuin started on the north-bound track looking for the designated station. When in a cut on a curve, where he would have been able to see the approaching train only 661 feet, he was struck by the engine and killed. \* \* \* Here the work was surveying and marking the changes to be made in the position of the crossties and rails, so as to make a better curve. No distinction can be founded on the failure of the railroad to complete the work by actually making the changes contemplated. Making the survey was as much a part of the work as laying the rails according to the survey. The numerous cases in which the work was on things which had not at the time become instrumentalities of interstate commerce obviously have no application."

**§ 478. Employes Handling Rails on Tracks of Interstate Carriers.** The status of the employes of the interstate carriers in handling rails along tracks constituting interstate highways, depends upon the closeness of the relation of the work to interstate commerce; for, if the

27. *Southern R. Co. v. McGuin*, 153 C. C. A. 447, 240 Fed. 649.

particular employment at the time of an injury, is not such as to constitute, in a practicable sense, a part of interstate transportation, the federal Act does not apply.<sup>28</sup> The general rule is that an employe is engaged in interstate commerce if the labor of handling the rails is so closely connected with interstate commerce as to be in legal contemplation, a part of it. Employes engaged in taking out old rails from a track over which interstate traffic is regularly conveyed, or in replacing them with new rails, are, beyond any question, within the federal statute;<sup>29</sup> because such labor is as directly

28. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992, aff'g (Mo. App.), 180 S. W. 443; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188, aff'g 214 N. Y. 413, Ann. Cas. 1916E 467, 108 N. E. 644; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902.

29. *United States. Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893.

*Arkansas. Treadway v. St. Louis, I. M. & S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

*Colorado. Denver & R. G. R. Co. v. Da Vella*, — Colo. —, 165 Pac. 254.

*Indiana. Southern Ry. Co. v. Howerton*, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369.

*Kentucky. Cincinnati, N. O. & T. P. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690; *Cincinnati, N. O. & T. P. R. Co. v. Tucker*, 168 Ky. 144, 181 S. W. 940; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

*Minnesota. Cherpiski v. Great Northern R. Co.*, 128 Minn. 360, 150 N. W. 1091.

*New Jersey. Willever v. Delaware, L. & W. R. Co.*, 87 N. J. L. 348, 94 Atl. 595.

*New York. Bitondo v. New York Cent. & H. River R. Co.*, 163 N. Y. App. Div. 823, 149 N. Y. Supp. 339.

*Pennsylvania. Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461; *Glunt v. Pennsylvania R. Co.*, 249 Pa. 522, 95 Atl. 109.

*Texas. Missouri, K. & T. R. Co. of Texas v. Mooney*, — Tex. Civ. App. —, 181 S. W. 543.

"A section hand, employed in looking after and repairing the track of a railroad company engaged in interstate commerce, while employed in such work, is an employe engaged in interstate commerce; and, it being stipulated that defendant was engaged in interstate commerce, the inquiry is: Was the work which deceased was doing at the time of his injury a part of the interstate commerce in which defendant was engaged? It was an interstate track and roadbed, which defendant was obliged to keep in repair to move cars carrying interstate commerce. Deceased, at the time of his injury, was engaged in inspecting and repairing the track, as well as removing old rails, which were along the side of, and which

and as closely connected with interstate commerce as the carrying of a bolt to repair a bridge regularly used in interstate commerce, and, therefore, within the influence of the rule that employes repairing or maintaining the track and roadbed, are under the national statute.<sup>30</sup> To this extent there is unanimity of opinion among the courts since the decision of the national court in the Pedersen case.<sup>31</sup>

**§ 479. Picking up Old Rails and Storing New Ones Along Track for Future Use.** But the character of the employment of a laborer picking up old rails piled along the right of way or storing or piling new rails for future use, has not been specifically adjudicated by the national Supreme Court, and there is apparently a conflict of opinion in the decisions of other courts. Some courts, under the influence of the doctrines announced in the Shanks,<sup>32</sup> Yurkonis,<sup>33</sup> Harrington,<sup>34</sup> Winters,<sup>35</sup> and other cases applied to different facts, have held that employes in so handling rails are not engaged in work which is a part of interstate commerce. For example, a trackman in the employ of a railroad company, at the time he was injured, was placing new rails into a pit between two tracks where the rails were to be stored until they were required for track repairing in the future. His employment, while so engaged, it was held, was no

we think it fair to assume were taken from the train. But whether this is a warranted assumption or not makes no material difference in this case, because a part of the duties of deceased at the time, and in which he was engaged, was to inspect and repair the track." *Denver & R. G. R. Co. v. Da Vella, supra.*

30. Section 473, *supra*.

31. Section 470, *supra*.

32. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188, *aff'd* 214 N. Y. 413, *Ann. Cas.* 1916E 467, 108

N. E. 644.

33. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902, *Dismissed*. Same case, 137 C. C. A. 23, 220 Fed. 429.

34. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992, *aff'g.* (Mo. App.), 180 S. W. 443.

35. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127, *aff'g.* 131 Minn. 496, 155 N. W. 1103.



part of interstate commerce.<sup>36</sup> Similarly, a section hand while loading, upon a flat car, unused rails which had theretofore been removed from the track, and had been left on the right of way, it was held in another case, was not employed in interstate commerce.<sup>37</sup> But, on the other hand, in apparent conflict with at least the foregoing Kentucky cases cited, the Federal Circuit Court of Appeals for the Third District held that an assistant foreman of a track gang while engaged in removing old rails from where they had been left between the tracks after being taken out a few days before, was en-

36. *Hudson & M. R. Co. v. Iorio*, 152 C. C. A. 641, 239 Fed. 855, in which the court said: "There is plainly a difference between the actual or imminent employment of the bolts in repairing the bridge, as in the *Pedersen Case*, and the mining of coal wherewith to run interstate locomotives, as in the *Yurkonis Case*. Whether such difference entails a distinction is a matter upon which opinions might conflict, as the dissent in Supreme Court decisions under this statute clearly shows. But by the latest pronouncement of that court in *Minneapolis, etc., Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. (January 8, 1917), it is in effect declared that when one claims the benefit of the act here invoked, because of the character or employment of the thing upon which he was working at the time of injury, then the character of that thing 'as an instrument of commerce depended on its employment at the time (of injury), not upon remote probabilities, or upon accidental later events.' It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never

occur, were at the moment engaged in, or practically part of, interstate commerce; for that commerce was going on without any present assistance, either from Iorio, or the rails on which he was working, or the men who were working with him. We therefore hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute, under circumstances such as shown here. By that test plaintiff below was not practically engaged in or a part of interstate commerce when he was hurt, and the judgment is reversed."

37. *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690. Said the Court: "It will be observed that it nowhere appears that Hansford was engaged, either in taking out old rails or putting in new rails; the most that can be said from the proof is that Hansford was engaged in loading old rails that had, at some time, been taken out of the track and were lying on the right of way." To the same effect: *Illinois Cent. R. Co. v. Kelly*, 167 Ky. 745, 181 S. W. 375.

gaged in interstate commerce.<sup>38</sup> A similar conclusion was reached by the Circuit Court of Appeals for the First Circuit, but in that case there was this additional factor: the work train upon which the rails were being loaded was in transit, subject to the delays of the work, from a point in Maine to a point in Canada.<sup>39</sup> An employe assisting in loading rails on a flat car was held not to be within the protection of the Federal Act, but nothing was shown whether the rails were old or new, where they came from, where they were taken, or where the car was to go when loaded.<sup>40</sup> As the law presumes, in the absence of evidence to the contrary, that an employe is engaged in intrastate commerce, the decision of the court in this case was undoubtedly correct.<sup>41</sup> An appellate court in New Jersey held that an employe was not engaged in interstate commerce while he was removing old rails from the track of an interstate carrier and replacing them with new ones;<sup>42</sup> but the act of the

38. *Philadelphia, B. & W. R. Co. v. McConnell*, 142 C. C. A. 555, 228 Fed. 263, in which Judge Woolley said: "Here the work was not being done independently of the interstate commerce in which the defendant was engaged, nor was the performance of the work a matter of indifference so far as that commerce was concerned. The removal of old rails from between the tracks on the roadbed of a railroad over which moves heavy traffic, both interstate and intrastate, constitutes keeping the tracks and roadbed in suitable condition for interstate commerce, and is as necessary for the proper maintenance of the tracks and roadbed as renewing the tracks. The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. This included removing old rails and installing new ones. The work of removing old rails was not complete when

they were lifted from their place upon the ties and tossed upon the roadbed, but was complete only when they were carried away from the place where they lay between the tracks. The removal of old rails was as much a part of the repair work as the bringing of new rails to the place to be repaired. If this be true, this case is within the *Pedersen Case*, and believing it to be true, we feel that this case is ruled by the principle declared by the Supreme Court in that case."

39. *Canadian Pac. R. Co. v. Thompson*, 146 C. C. A. 401, 232 Fed. 353.

40. *Tamura v. Great Northern R. Co.*, 58 Wash. 316, 108 Pac. 774.

41. *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486, aff'g 5 Tenn. C. C. A. 519.

42. *Pierson v. New York, S. & W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233.

employee in this case was so plainly connected with interstate commerce as to be in a direct sense a part of it, and the decision of the court was erroneous.<sup>43</sup> In another action under the Federal Act, it appeared that the plaintiff, a section foreman, was injured while taking out rails from an interstate track and replacing them with new ones. The trial court submitted the question to the jury whether the plaintiff was employed in interstate commerce.<sup>44</sup> But under these facts, conceded by both parties, the plaintiff's employment in interstate commerce was shown as a legal conclusion. A section gang composed of about 30 men was employed in taking up old rails and replacing them with new ones on a railroad running from a point in Utah to Omaha, Neb. The old rails were first placed along the side of the track and then removed on push cars to scrap piles about 30 yards from where they were picked up. A member of the gang who was employed, exclusively, in moving the old rails from where they were thrown along the side of the track to the scrap pile, was held not to be engaged in interstate commerce.<sup>44a</sup> The decision of the court in this case does not seem to be sound, for Perez's work was but a part of the larger task of repairing an interstate line and the removal of the old rails, as the work proceeded, to the scrap pile was but an incident thereof.

**§ 480. When Laborers Handling Ties for Common Carriers are Under the Federal Act.** The nature of the work being done at the time of the injury determines whether or not an employee handling railroad ties is employed in interstate commerce. That employees while taking out old ties and putting in new ties in a track permanently devoted to the carrying of interstate traffic, are engaged in interstate commerce, is indisputable;

43. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153, rev'g 117 C. C. A. 33, 197 Fed. 537.

44. *Cherpeski v. Great N. R. Co.*, 128 Minn. 360, 150 N. W. 1091.

44a. *Perez v. Union P. R. Co.*, ——— Utah ———, 173 Pac. 236.



for the work of repairing an interstate track is a part of interstate commerce within the statute.<sup>45</sup> On the other hand, a workman while employed in making ties, would have no remedy under the federal statute as the connection of his work with interstate commerce would be too remote. For example, a section laborer was injured while peeling hemlock ties, being a part of the process of the manufacture of the ties intended for future use on an interstate track. Such work did not constitute interstate employment.<sup>46</sup> Likewise, a conductor or in charge of a work train loading and carrying new

45. **United States.** *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604.

**Arkansas.** *Tredway v. St. Louis, I. M. & S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

**California.** *Southern Pac. Co. v. Industrial Acc. Commission of California*, 174 Cal. 8, 161 Pac. 1139.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Indiana.** *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. App. —, 115 N. E. 685.

**Kentucky.** *Louisville & N. R. Co. v. William's Adm'r*, 175 Ky. 679, 194 S. W. 920; *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209, 172 S. W. 517.

**Michigan.** *Salabrin v. Ann Arbor R. Co.*, 194 Mich. 458, 160 N. W. 552.

**Missouri.** *Dowell v. Wabash Ry. Co.*, — Mo. App. —, 190 S. W. 939; *Hardwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

46. *Karras v. Chicago & N. W. R. Co.*, 165 Wis., 578, 162 N. W. 923, in which the court said: "It appears that the ties plaintiff was peeling had been purchased by defendant at Watersmeet, Mich., and shipped to this track

section. They were dumped on piles of from 30 to 50 and more to be peeled and subsequently used where needed in the repair of the track. They were so used during the summer and up to some time in September. Ties with the bark on were not put into the track. Hence in order to be fully prepared for track repair they must be peeled. The peeling, therefore, was a part of the process of manufacture of the ties for the purpose intended. This process, in the case at bar, was carried on independent of, and separate from, a then immediate use of the ties in track repair. It was a preparation of them for future use. That it was done by the defendant upon its right of way, instead of by others elsewhere, or that the ties were destined for interstate commerce, cannot constitute the process of their manufacture interstate commerce work. To constitute that there must be an actual entering upon or engagement in such work. A mere manufacture or preparation of material which is destined at some time in the future at some place to be used in interstate commerce work is not enough."

<sup>1</sup> Control Carriers 53



ties from one point to another in the same state for the purpose of being treated in a tie-treating plant operated by the carrier, and to be thereafter used in repairing an interstate track, was not engaged in commerce between the states.<sup>47</sup> A section hand engaged in carrying ties after they had been unloaded from cars and thrown besides the track, and stacking them beyond a side track and on the right of way, where they were to remain until needed in repairing an interstate track at some future time, was not employed in interstate commerce although the ties were in fact afterwards used in repairing the track.<sup>48</sup>

**§ 481. Employees Handling Ballast, Gravel, Sand, Etc., for Use in Repairing Interstate Tracks.** Employees engaged in assisting in moving ballast to be used in the repair of an interstate track are within the terms of the Federal Act. Thus, an engineer on an extra train running between two points in the same state and containing only gravel to be used in repairing and improving a roadbed over which interstate commerce regularly passed, was employed in interstate commerce.<sup>49</sup> For a greater reason, an employe who was a member of a crew in charge of a train-load of gravel being transported from North Dakota to Montana for the purpose of repairing an interstate line, was held to be engaged in interstate commerce.<sup>50</sup> A day laborer in the employment of a rail-

47. *Alexander v. Great Northern R. Co.*, 51 Mont. 565, 154 Pac. 914. This decision is in harmony with the ruling of the Supreme Court in *Lehigh V. R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992, in which the same rule was applied to a local movement of company coal from storage tracks to coal chutes.

48. *Missouri, K. & T. Ry. Co. of Texas v. Watson*, — Tex. Civ. App. —, 195 S. W. 1177.

49. *Holmberg v. Lake Shore & M. S. R. Co.*, 188 Mich. 605, 155 N. W. 504.

50. *Hein v. Great Northern R. R.*, 34 N. D. 440, 159 N. W. 14. Said the court: "In short plaintiff asserts that in hauling its own gravel trains across the state line loaded with gravel procured in this state for use as ballast in Montana, defendant was not engaged in interstate commerce, and hence the deceased was not engaged in interstate commerce, and commerce so as to make the provisions of the federal act appli-

road company, who was at a hill where gravel was loosened by the explosion of dynamite, was not engaged in interstate commerce in loading the gravel upon railroad cars although it was to be used in the repair of interstate lines.<sup>51</sup> The court in this case relied upon *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 53 Sup. Ct. 902, and held that the work was too remote from interstate transportation.

**§ 482. Excavating and Deepening Ditches Along Railroad Tracks for Drainage Purposes.** A track over which interstate commerce is moving is an instrumentality of interstate commerce.<sup>52</sup> When an employe is engaged in a service immediately productive of the mainte-

cable, unless it be shown further that the gravel was to be used for the repair of its main line carrying interstate traffic. Judicial notice is taken of geographical facts and location of defendant's railroad, its business as a common carrier engaged in both interstate and intrastate traffic. It is not necessary that the proof disclose that the gravel was to be used upon the main line. It is sufficient to invoke the federal act if deceased was operating an engine hauling gravel train for part of a continuous haul from North Dakota into Montana. That fact alone establishes that interstate traffic was being performed and carried forward."

51. *Yazoo & M. V. R. Co. v. Houston*, — Miss. —, 75 So. 690.

52. *United States. Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153; *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604; *Tralich v. Chicago, M. & St. P. Ry. Co.*, 217 Fed. 675; *Central R. of New Jersey v. Cola-*

*surdo*, 113 C. C. A. 379, 192 Fed. 901; *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893.

**Arkansas.** *Treadway v. St. Louis, I. M. & S. R. Co.*, 127 Ark. 211, 191 S. W. 930.

**Colorado.** *Denver & R. G. R. Co. v. Wilson*, — Colo. —, 163 Pac. 857.

**Indiana.** *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. App. —, 115 N. E. 685; *Southern R. Co. v. Howerton*, 182 Ind. 208, 105 N. E. 1025 (Ind. App.), 101 N. E. 121.

**Kentucky.** *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209, 172 S. W. 517; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

**Minnesota.** *Cherpeski v. Great Northern R. Co.*, 128 Minn. 360, 150 N. W. 1091.

**Missouri.** *Harwick v. Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328.

**New Jersey.** *Willever v. Delaware, L. & W. R. Co.*, 87 N. J. L. 348, 94 Atl. 595.

**Texas.** *Texas & P. Ry. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185.

nance or repair of intimately connected and essential features of interstate commerce, his rights are governed by the federal statute.<sup>53</sup> An essential part of the repair of railroad tracks is to keep them well drained so that trains may pass over them in safety. Employees engaged in excavating or deepening ditches along the tracks to drain off surface water, are engaged in interstate commerce.<sup>54</sup>

§ 483. **Repairing or Rebuilding Depots, Roundhouses, Sheds, etc., not Employment in Interstate Commerce.** Employees of common carriers by railroad injured while reconstructing or repairing such buildings as stations, roundhouses and machine shops, have no remedy under the federal act. Their work, while so employed, has not a direct and immediate connection with interstate commerce, although freight sheds, shops, roundhouses and other like facilities provided for handling and discharging interstate freight and cars, are in a remote sense, instrumentalities used in interstate commerce. The status of such employees, so far as interstate employment is concerned, has not been specifically passed upon by the United States Supreme Court, but it necessarily follows from the principles of the decisions cited in the notes, that they are not controlled by the federal act.<sup>55</sup> For example, a railroad carpenter

53. *Ex Parte Atlantic Coast Line R. Co.*, 190 Ala. 132, 67 So. 256.

54. *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960.

55. *Baltimore & O. R. Co. v. Branson*, 242 U. S. 623, 61 L. Ed. 534, 37 Sup. Ct. 244 (mem. dec.); *Minneapolis & St. L. R. Co. v. Nash*, 242 U. S. 619, 61 L. Ed. 531, 37 Sup. Ct. 239 (mem. dec.); *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127; *Illinois Cent. R. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 Sup. Ct. 446 (mem. dec.); *Shanks v. Delaware, L. & W. R. Co.*, 239 C.

S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188.

A plumber engaged in inspecting and repairing pipes which constituted a part of the plumbing apparatus beneath a station, was held to be engaged in interstate commerce. *Vollmers v. New York Cent. R. Co.*, — N. Y. App. Div. —, 167 N. Y. Supp. 426. But this decision is erroneous.

A carpenter injured while repairing a coal chute from which apparatus beneath a station, was not engaged in interstate commerce. *Gallagher v. New York Cent. R. Co.*, — N. Y. App. Div. —, 167 N. Y. Supp. 480.



making repairs to a coal chute and a roundhouse used for both kinds of business, interstate and intrastate, was not employed in interstate commerce.<sup>56</sup> A carpenter engaged in building an addition to repair shops where in engines used for both interstate and intrastate commerce were repaired, was not employed in interstate commerce.<sup>57</sup> In another case, it was held that an employe repairing a roundhouse where interstate engines were inspected, housed and repaired, had no remedy under the federal act.<sup>58</sup> A carpenter riveting a stove pipe for a roundhouse where engines were sheltered for service in interstate commerce, was properly held not to have been engaged in interstate commerce.<sup>59</sup> A carpenter engaged in building a coal chute for a common carrier engaged in interstate commerce, was not subject to the federal act.<sup>60</sup> In *Nash v. Minneapolis & St. L. R. Co.*,<sup>61</sup> the supreme court of Minnesota held that a section hand, assisting in moving an outhouse which was to be used as an appendage to a station provided for the accommodation of interstate as well as intrastate passengers, was engaged in interstate commerce, but on writ of error to the national Supreme Court, the case was reversed in a memorandum opinion.<sup>62</sup>

**§ 484. Employes Working in Machine and Repair Shops, Roundhouses and Other Like Buildings.** With the exception of employes repairing cars and engines

56. *Kelly v. Pennsylvania R. Co.* 151 C. C. A. 171, 238 Fed. 95.

57. *Thompson v. Cincinnati, N. O. & T. P. R. Co.*, 165 Ky. 256, Ann. Cas. 1917A 1266, 176 S. W. 1006.

58. *Castonguay v. Grand Trunk Ry.* — Vt. —, 100 Atl. 908.

59. *Dunn v. Missouri Pac. Ry. Co.*, — Mo. App. —, 190 S. W. 966.

60. *Voris v. Chicago, M. & St. P. R. Co.*, 172 Mo. App. 125, 157 S. W. 835.

61. 131 Minn. 166, 154 N. W. 957.

62. *Minneapolis & St. L. R. Co. v. Nash*, 242 619, 61 L. Ed. 531, 37 Sup. Ct. 239 (mem. dec.). The judgment was reversed upon the authority of the following cases: *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902, *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188, *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. A. 992, and *Illinois Cent. R. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 Sup. Ct. 446 (mem. dec.).



devoted and assigned *exclusively* to interstate traffic, servants of common carriers by railroad working in such places as roundhouses, repair shops, machine shops and buildings of like character maintained by railroad companies are not ordinarily governed by the federal statute, and, if injured, must look to the laws of the states for their remedies. This rule was applied and an employe was held not to have a remedy under the federal act while he was engaged as a machinist in the shop of an interstate carrier in taking down and putting into a new location an overhead counter shaft through which power was communicated to some of the machinery utilized in repairing locomotives used in interstate transportation, although he was usually employed in repairing engines used in both interstate and intrastate commerce. The work of so altering the location of a fixture in the shop did not have such a close and direct relationship with interstate commerce as to be deemed a part of it.<sup>63</sup> The supreme court of Minnesota decided that an employe injured by the negligence of a fellow servant while engaged in wheeling a barrow of coal to heat a shop in which other employes were engaged in making repairs to cars that had been and were to be used in carrying interstate commerce, was employed in interstate commerce, but on writ of error to the Supreme Court of the United States, this cause was reversed.<sup>64</sup> For similar reasons, an employe injured while repairing the wall of a roundhouse where engines carrying interstate and intrastate commerce were repaired and

63. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188.

A hostler working on an engine in a roundhouse, which had just returned from an intrastate trip, was not engaged in interstate commerce although the evidence disclosed that, on the previous day, the engine had been used in transporting interstate commerce and it was generally used in hauling both kinds of freight. *La Casse*

*v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So. 1012.

64. *Illinois Cent. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 Sup. Ct. 446 (mem. dec.). In this case the court handed down a memorandum opinion, saying: "Judgment reversed with costs upon the authority of *Delaware, Lackawana & Western Railroad v. Yurkonis*, 238 U. S. 439; *Shanks v. Delaware, Lackawana & Western Railroad*, 239 U. S. 556."

housed, was not engaged in interstate commerce.<sup>65</sup> And so, an employe building a scaffold for the purpose of whitewashing or painting the ceiling of a freight shed used for storing, placing and handling interstate shipments of freight, did not have a remedy under the federal act; for, while the freight shed was in a sense an instrumentality used for housing interstate traffic, the work of building the scaffold possessed too remote a connection with interstate commerce to be a part of it.<sup>66</sup> A janitor breaking up coal for a furnace in the general office of a railroad company engaged in interstate commerce, is not thereby employed in interstate commerce within the federal act.<sup>67</sup> A railway employe working in shops where cars used in interstate commerce were repaired, had no remedy under the federal act because of an injury sustained while assisting in unloading a carload of barrels of paint and oil to be used in repairing cars.<sup>68</sup> Nor was an employe working in a coal chute assisting in elevating coal, some of which would be used in filling the tenders of interstate engines, engaged in interstate commerce within the purview of the federal act.<sup>69</sup> In the *Shanks* case, cited *supra*, the Supreme Court, in reviewing many of its former decisions as to when an employe was engaged in interstate commerce, said: "The question for decision is, was *Shanks* at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the

65. *Castonguay v. Grand Trunk Ry.* — Vt. —, 100 Atl. 908. In this case the court followed the *Shanks* case, *supra*, and said: "If *Shanks* was not engaged in interstate commerce, *Castonguay* could not have been, for he was one step further removed from actual transportation."

66. *Killes v. Great Northern R. Co.*, 93 Wash. 416, 161 Pac. 69. The conclusion of the court in this case was correct, but it erred in

saying, *obiter*, that if the employe had been repairing the shed itself he would have been engaged in interstate commerce.

67. *Great Northern R. Co. v. King*, 165 Wis. 159, 161 N. W. 371.

68. *Salmon v. Southern R. Co.*, 133 Tenn. 223, 180 S. W. 165.

69. *Zavitovsky v. Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974.

injury was suffered. Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it. Applying this test, we have held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar in a car then in use in such commerce, *Walsh v. New York, New Haven & Hartford R. R.*, 223 U. S. 1; where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade, *Norfolk & Western Ry. v. Earnest*, 229 U. S. 114; where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work, *Pederson v. Del., Lack & West. R. R.*, 229 U. S. 146; where a clerk is on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so the switching crew will know what to do with them when breaking up the train, *St. Louis, San Francisco & Texas Ry. v. Seale*, 229 U. S. 156; where a fireman, having prepared his engine for a trip in interstate commerce, and being about to start on his run, is walking across adjacent tracks on an errand consistent with his duties, *North Carolina R. R. v. Zachary*, 232 U. S. 248; and where a brakeman on a train carrying several cars of interstate and two of intrastate freight is assisting in securely placing the latter on a side track at an intermediate station to the end that they may not run back on the main track and that the train may proceed on its journey with the interstate freight, *New York Central R. R. v. Carr*, 238 U. S. 260. Without departing from this test, we also have held that the requisite employment in interstate com-



merce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another, *Ill. Cent. R. R. v. Behrens*, 233 U. S. 473, and where an employe in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce, *Del., Lack. & West. R. R. v. Yurkonis*, 238 U. S. 439. In neither instance could the service indicated be said to be interstate transportation or so closely related to it as to be practically a part of it. Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the *Yurkonis Case*, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the Employers' Liability Act."

§ 485. **Earlier Decisions Overruled by Rulings of National Supreme Court Cited in Two Foregoing Paragraphs.** Many decisions of state courts rendered prior thereto have, in effect, been overruled by the rulings of the United States Supreme Court in the *Shanks*, *Cousins*, *Nash* and *Branson* cases, cited in the two foregoing paragraphs. Among these decisions that must now be taken to have applied incorrect rules in determining interstate employment are, *Newkirk v. Pryor*,<sup>70</sup> in which

70. (Mo. App.), 183 S. W. 682.



the court held that a carpenter repairing a pump house and pumping station, was engaged in interstate commerce: *Thomas v. Boston & M. R. R.*,<sup>71</sup> in which the court held that a carpenter, while employed in moving debris from a roundhouse which had partially been destroyed by fire, in order that a new roundhouse might be erected, was engaged in interstate commerce: *Eng v. Southern Pac. Co.*,<sup>72</sup> wherein the court held that a carpenter employed in sawing boards and nailing them in place on the wall of a new office in a freight shed, was employed in interstate commerce; *Chrosziel v. New York Cent. & H. River R. Co.*,<sup>73</sup> in which the court decided that a drill machine runner, assisting in the construction of a railroad station used for both interstate and intrastate traffic, was engaged in interstate commerce so as to bring his case within the exclusive operation of the federal act.

**§ 486. When Car and Engine Repairers are Employed in Interstate Commerce.** The Federal Act is limited to employees injured while engaged in interstate "commerce." This is a broader term than interstate "transportation" which would probably limit the application of the statute to employees engaged in actually moving trains; but the field covered is not so circumscribed. Cars and engines are instrumentalities of commerce and within the power of Congress to regulate. As a general proposition, it may be correctly stated that employees repairing such engines and cars are within the purview of the statute if the cars and engines are actually *then* used in interstate commerce or in work so closely related thereto as to be in fact a part of commerce from one state to another or to a foreign country. This principle is well established, but there has been a considerable diversity of opinion in its application to concrete facts. The conflict arises from a disagreement as to when a car or an engine, being repaired, is in fact used in commerce within the statute. The status of an employe, un-

71. 134 C. C. A. 554, 219 Fed. 180.

72. 210 Fed. 92.

73. 174 N. Y. App. Div. 175, 159 N. Y. Supp. 924.

der the Act, depends upon the use being made of the instrumentality he is repairing at the time of the injury. Decisions involving the interstate employment of car and engine repairers under variable circumstances are hereinafter reviewed.

**§ 487. Employees Repairing Engines and Cars in Transit or Temporarily Delayed.** Unquestionably employes of common carriers by railroad repairing engines while being actually used in pulling interstate trains<sup>74</sup> or, after being assigned to interstate runs, in preparing them for that purpose even though not coupled to the train, are engaged in interstate commerce.<sup>75</sup> Similarly employes repairing cars in transit and loaded with interstate freight,<sup>76</sup> or cars containing intrastate freight constituting a part of an interstate train,<sup>77</sup> or cars contain-

74. *Chicago, R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185.

75. *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159.

76. *United States v. Walsh*, New York, N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158; *Baltimore & O. R. Co. v. Darr*, 124 C. C. A. 565, 204 Fed. 751, 47 L. R. A. (N. S.) 4; *United States v. Wheeling & L. E. R. Co.*, 167 Fed. 198; *United States v. Central of Georgia Ry. Co.*, 157 Fed. 893; *United States v. Colorado & N. W. R. Co.*, 85 C. C. A. 27, 157 Fed. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893; *United States v. Northern Pac. Terminal Co.*, 144 Fed. 861; *Chicago, M. & St. P. Ry. Co. v. Voel-*

*ker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

**Alabama.** *Alabama Great Southern R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 335; *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

**Delaware.** *Winkler v. Philadelphia & R. R. Co.*, 4 Pennw. (Del.) 80, 53 Atl. 90.

**Illinois.** *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, L. R. A. 1916A 450, 109 N. E. 342.

**New York.** *Whalen v. New York Cent. & H. River R. Co.*, 173 N. Y. App. Div. 268, 159 N. Y. Supp. 244.

**North Carolina.** *Lloyd v. Southern R. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, 81 S. E. 1003.

**Washington.** *Snyder v. Great Northern R. Co.*, 88 Wash. 49, 152 Pac. 703.

77. *United States v. New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1; *Southern R. Co. v. Snyder*, 109 C. C. A. 344, 187 Fed. 492; *Erie R.*

ing interstate freight temporarily stopped or set aside for repairs, are within the terms of the Federal Act.<sup>75</sup>

**§ 488. Status of Shopmen Repairing Empty Cars in Terminal Yards and Engines in Roundhouses.** But the majority of railroad employees in the United States repairing engines and cars, work at terminal points upon cars and engines when not in actual use in moving traffic. Their employment consists in repairing engines in roundhouses between trips and cars on repair tracks and in shops in terminal yards. Their labor, as a rule, is entirely distinct and separate from train service proper. For many years after the enactment of the Federal Employers' Liability Act, the interstate character of such employees in repairing engines and cars used indiscriminately in moving both interstate and intrastate traffic was not passed upon by the national Supreme Court. Many state and federal courts had held that an employee repairing a car or an engine, even while not being used in transportation and set aside for repairs or preparation for another trip, was engaged in interstate com-

Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722; Hohenleitner v. Southern Pac. Co., 177 Fed. 796; Norfolk & W. R. Co. v. United States, 101 C. C. A. 249, 177 Fed. 623; United States v. Erie R. Co., 166 Fed. 352; Chicago, M. & St. P. R. Co. v. United States, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; United States v. St. Louis, I. M. & S. R. Co., 154 Fed. 516.

Iowa. Bruckshaw v. Chicago, R. I. & P. R. Co., 173 Iowa 207, 155 N. W. 273.

Michigan. Fernette v. Pere Marquette R. Co., 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834.

Minnesota. Breske v. Minneapolis & St. L. R. Co., 115 Minn. 386, 132 N. W. 337.

Missouri. Noel v. Quincy, O. & K. C. R. Co. (Mo. App.), 182 S. W. 787.

West Virginia. Findley v. Coal & Coke R. Co., 76 W. Va. 747, 87 S. E. 198.

78. United States. Great Northern R. Co. v. Otos, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; St. Louis Southwestern R. Co. v. United States, 106 C. C. A. 136, 183 Fed. 770.

Arkansas. St. Louis, I. M. & S. R. Co. v. Sharp, 115 Ark. 308, 171 S. W. 95.

Michigan. Gaines v. Detroit, G. H. & M. R. Co., 181 Mich. 376, 148 N. W. 397.

Mississippi. Hooks v. New Orleans & N. E. R. Co., 111 Miss. 743, 72 So. 147.

South Carolina. Lorick v. Seaboard Air Line Ry. 101 S. C. 276, Ann. Cas. 1917D 920, 86 S. E. 675.

Vermont. Lynch's Adm'r v.

merce if the engine or car, being repaired, as the case might be, was in fact, when "on the road," used indiscriminately in both interstate and intrastate commerce.<sup>79</sup> But, under a controlling decision of the national Supreme Court rendered in 1917,<sup>80</sup> the rule adopted by these courts to determine interstate employment of car and engine repairers, was too broad; for the court in the Winters case held that an employe repairing an engine when not used in pulling trains, is not within the purview of the Federal statute unless the engine being repaired is exclu-

Central Vermont R. Co., 89 Vt. 363, 95 Atl. 683.

**Washington.** Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47, 155 Pac. 422.

**Wisconsin.** Smiegil v. Great Northern R. Co., 165 Wis. 57, 160 N. W. 1057.

In *Delk v. St. Louis & S. F. R. Co.*, *supra*, the court said: "The majority of the Circuit Court of Appeals (Judges Severens and Richards) held that the car, with the defective coupler, was, at the time of the injury in question and within the meaning of the act, engaged in interstate commerce. Judge Severens said: 'The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation.'"

79. **United States.** Law v. Illinois Cent. R. Co., 126 C. C. A. 27, 208 Fed. 869, L. R. A. 1915C 17; Northern Pac. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Baltimore & O. R. Co. v. Darr, 124 C. C. A. 565, 204 Fed. 751, 47 L. R. A. (N. S.) 4.

**Arkansas.** St. Louis & S. F. R. Co. v. Conarty, 106 Ark. 421, 155 S. W. 93.

**California.** Southern Pac. Co. v. Pillsbury, 170 Cal. 782, L. R. A. 1916E 916, 151 Pac. 277.

**Illinois.** Staley v. Illinois Cent. R. Co., 268 Ill. 356, L. R. A. 1916A 450, 109 N. E. 342.

**Maryland.** Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225.

**Michigan.** Evans v. Detroit, G. H. & M. R. Co., 181 Mich. 413, 148 N. W. 490.

**Missouri.** Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202, 177 S. W. 1127.

**Texas.** Missouri, K. & T. Ry. Co. of Texas v. Denahy, — Tex. Civ. App. —, 165 S. W. 529.

80. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127, aff'g 131 Minn. 496, 155 N. W. 1103. This case is reported on first appeal to the state supreme court in 126 Minn. 260, 148 N. W. 106 and second appeal in 131 Minn. 181, 154 N. W. 964. Accord: *Parsons v. Delaware & H. Co.*, 167 N. Y. App. Div. 536, 153 N. Y. Supp. 179; *Okrzesz v. Lehigh Valley R. Co.*, 170 N. Y. App. Div. 15, 155 N. Y. Supp. 919.



sively devoted and assigned to the movement of interstate traffic. The same principle would necessarily apply to car repairers. Winters was injured while repairing an engine in a roundhouse, which had been used in pulling interstate traffic on its last trip and which, in fact, three days thereafter, was used for the same purpose after the repairs were made. The court, in holding that he was not employed in interstate commerce, said: "This engine 'had been used in the hauling of freight trains over the defendant's line . . . which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury.' The last time before the injury on which the engine was used was on October 18, when it pulled a freight train to Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."<sup>81</sup>

**§ 489. Subsequent Cases Applying the Doctrine of the Winters Case to Car and Engine Repairers.** Following the decision of the national Supreme Court in the

81. See also *Baltimore & O. R. Co. v. Branson*, 242 U. S. 623, 61 L. Ed. 534, 37 Sup. Ct. 244 (mem. dec.), rev'g 128 Md. 678, 98 Atl. 225; *Chicago, K. & S. Ry. Co. v.*

*Kindlesparker*, — U. S. —, 62 L. Ed. —, 38 Sup. Ct. 425 (mem. dec.), rev'g 148 C. C. A. 17, 234 Fed. 1, decided April 29, 1918.

Winters case, *supra*, other courts have uniformly held that employes repairing cars and engines at terminal points while not being actually used in interstate commerce, are governed by state laws as to injuries occurring when the cars and engines are used indiscriminately in moving both kinds of commerce and without being exclusively assigned to interstate commerce. Thus, in *Loveless v. Louisville & N. R. Co.*,<sup>82</sup> it appeared that a car repairer, while repairing a car in railroad shops on July 10th which had been used from June 10th to July 2d on interstate trips and was, immediately after the repairs, used for an interstate trip, was not engaged in interstate commerce. Similarly, in *Central R. Co. of New Jersey v. Paslick*,<sup>83</sup> the plaintiff was injured while working as a helper in the blacksmith shop of a railroad company, repairing a foreign car. The court, in disposing of the question of his interstate status, remarked that if the repair of an engine in the interval between its interstate occupations is not sufficiently close to commerce to be a part of it, the repair of a car, which moves only when the engine hauls it, is certainly no closer. A blacksmith in a repair and work shop of a carrier, engaged in repairing cars and other instrumentalities of interstate commerce, was not within the control of the federal act.<sup>84</sup>

82. — Ala. —, 75 So. 7.

An employe engaged at the time he was injured in working upon and repairing an engine which had been used indiscriminately in both interstate and intrastate commerce prior thereto and which was thereafter used in interstate and intrastate commerce as occasion might require, had no remedy under the Federal Act. *Chicago & A. R. Co. v. Allen*, — C. C. A. —, 249 Fed. 280.

An employe repairing an empty car in a railroad yard which had been used in interstate commerce

but which was not exclusively used in interstate commerce, had no remedy under the federal act. *Deffenbaugh v. Union P. R. Co.*, — Kas. —, 171 Pac. 647.

An employe repairing an electric motor in a railroad yard was not engaged in interstate commerce. *O'Dell v. Southern Ry. Co.*, 248 Fed. 343.

83. 152 C. C. A. 547, 239 Fed. 713.

84. *Washington, B. & A. Elec. R. Co. v. Owens*. — Md. —, 101 Atl. 532.

85. Section 469, *supra*.

§ 490. **Differentiating Factors Between Rulings in Winters and Pedersen Cases.** A comparison of the ruling of the national Supreme Court in the Winters case, *supra*, and the doctrine of that court as announced in the Pedersen case,<sup>85</sup> well illustrates the demarcation between interstate and intrastate employment. The distinction made in holding that Winters was not engaged in interstate commerce when repairing an engine which had been pulling interstate trains and which was afterwards used for the same purpose, and that Pedersen, while carrying a bolt to repair a railroad bridge, was employed in interstate, seems, at first blush, elusive and subtle. But there are, nevertheless, sound differentiating factors between the two cases, though both are close to the border line of state and federal jurisdiction. A bridge, composing a part of a line of an interstate railroad, is an instrumentality which necessarily is permanently devoted and assigned to interstate transportation and, hence, the work of repairing such a structure constitutes employment under federal control. However, the engine while being repaired by Winters, was not then used in interstate commerce but was idle in the shops, and, what is more to the point, had not been so assigned to interstate transportation at the time of the injury so that an employe in repairing it could also be said to be engaged in that commerce. The engine was used in both kinds of commerce and not definitely assigned or devoted to either, though it so happened that it pulled an interstate train on its last trip and was, thereafter used in like employment. Had this engine been definitely assigned to pulling interstate trains, Winters would have been engaged in federal commerce within the doctrine of the Pedersen case. The engine would have then been used in interstate commerce as much so as the dining car in *Johnson v. Southern Pac. Co.*<sup>86</sup>

§ 491. **Illustrative Cases in which Car and Engine Repairers were not Employed in Interstate Commerce.**

86. 196 U. S. 1, 49 L. Ed. 363, 25 Sup. Ct. 158.



Employees working as car and engine repairers for interstate railroads were not subject to the federal act when engaged in such work, under the following circumstances: a car repairer in the employ of a railroad company was killed while repairing a car that had been transported from New Jersey to Pennsylvania carrying interstate commerce. At the time of the accident, the car had reached its destination and was empty. So far as the evidence disclosed, the car was in Pennsylvania awaiting orders, and, not long afterwards, it was moved to another point in Pennsylvania, beyond which it was not traced. The administrator could not recover under the federal act.<sup>87</sup> A carpenter, it appeared in evidence in another case, was repairing a freight car. No facts appeared as to what use had been made of the car either prior or subsequent to the accident. The plaintiff was denied a recovery under the federal act.<sup>88</sup> In another action it was disclosed that the plaintiff, a boiler maker working in the shops of a railroad company, was injured while repairing the boiler of an engine used in operating a derrick on a flat car while it lay on the ground near the roundhouse. This derrick was a part of a wrecking train which was subject to orders and was used regularly in the state of Illinois and in other states, when needed, depending upon the place of disaster. The wrecking train consisted of a locomotive, one or more flat cars, this derrick car and a bunk car. The employees on the wrecking train slept in the bunk car and remained there frequently for three or four days at a time. The boiler maker, while repairing such an engine near the roundhouse, was not engaged in interstate commerce.<sup>89</sup> A roundhouse employe working on an engine in a roundhouse which had just returned from an intrastate journey, was not engaged in interstate commerce although the engine was used indiscriminately in hauling both kinds of commerce.<sup>90</sup> A car repairer at the

87. *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 579.

88. *Louisville & N. R. Co. v. Moore*, 156 Ky. 708, 161 S. W. 1129.

89. *Ruck v. Chicago, M. & St. P. R. Co.*, 153 Wis. 158, 140 N. W. 1074.

90. *La Casse v. New Orleans, T. & M. R. Co.*, 135 La. 129, 64 So.



time of his death was repairing a box car which had been used a long time in both interstate and intrastate commerce, as occasion might arise, and was, at the time of injury, being repaired in the railroad terminal yard. The court held that the decedent was engaged in interstate commerce.<sup>91</sup> This decision was rendered before the decisions of the United States Supreme Court in the Winters case and has, no doubt, in effect, been overruled by it.

**§ 492. Repairing Cars and Engines Used Exclusively in Interstate Commerce.** Notwithstanding the limitation placed upon the interstate status of car and engine repairers in the decision of the national Supreme Court in the Winters case, employees engaged in the repair of cars used solely in interstate commerce are governed by the federal act and not by state laws.<sup>92</sup> An employe while working in a round house and repairing an engine used exclusively in hauling interstate passenger trains between Caliente, Nev., and Milford, Utah, was engaged in interstate commerce within the meaning of the Federal Act.<sup>92a</sup>

**§ 493. Interstate Status of Employes Painting Instrumentalities of Commerce Among the States.** Many

1012, in which the court said: "We do not understand this evidence to mean any more than this locomotive, like any other locomotive of the defendant company, or any of its cars, might be and was sometimes used in interstate commerce. Not that it was being so used at the time the decedent was attending to it. On the contrary the evidence shows that its last run, which was on the preceding day, had been from another intrastate point to Eunice. If the fact that a locomotive or a car might be used the next day, or whenever next needed, in interstate commerce, were equiva-

lent to being actually at the time in use in that commerce, the effect would be that whenever a railroad did not confine itself to intrastate commerce, but engaged also in interstate commerce, every one of its employes would at all times be engaged in interstate commerce when at their work."

91. *Northern Pac. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

92. *Smiegil v. Great Northern R. Co.*, 165 Wis. 57, 160 N. W. 1057.

92a. *Kuchenmeister v. Los Angeles & S. L. R. Co.*, — *Utah* —, 172 Pac. 725.

instrumentalities of interstate commerce must be painted in order to keep them in a safe and proper condition for the transportation of traffic. For, without paint, engines will corrode and the woodwork of cars and bridges will decay. Employees of common carriers by railroad, therefore, engaged in painting instrumentalities permanently devoted and assigned, or used in moving interstate traffic at the time of an injury, are under the control of the federal statute. For example, an employee, while painting a bridge which was a part of an interstate highway by railroad connecting the cities of Louisville, Ky. and Cincinnati, Ohio, was engaged in interstate commerce.<sup>93</sup> But an employee painting engines or cars used in interstate commerce is not under the federal statute unless those cars are *exclusively* devoted and assigned to interstate commerce, or unless they are actually in use in interstate commerce at the time of the injury. This rule is but an exemplification of the principle established by the Supreme Court in determining the status of employees repairing engines and cars in the Winters case.<sup>94</sup> Thus, the Supreme Court of Maryland held that an employee painting engines and cars used on an interstate highway was engaged in interstate commerce.<sup>95</sup> But on writ of error to the Supreme Court of the United States, the case was reversed in a memorandum opinion.<sup>96</sup> It did not appear from the

93. Louisville & N. R. Co. v. Netherton, 175 Ky. 159, 193 S. W. 1035. Said the Court: "It further appears that plaintiff, at the time of the accident, was engaged in painting the bridge and that this work was necessary to preserve the bridge and keep it in proper repair. In view of these facts, we conclude that, at the time of the accident, the defendant was engaged, and the plaintiff was employed, in interstate commerce."

94. Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A.

1127, aff'g 131 Minn. 496, 155 N. W. 1103.

95. Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225.

96. Baltimore & O. R. Co. v. Branson, 242 U. S. 623, 61 L. Ed. 534, 37 Sup. Ct. 244 (mem. dec.), 128 Md. 678, 98 Atl. 225. The case was reversed upon the authority of the following cases: Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358, 37 Sup. Ct. 170, 13 N. C. C. A. 1127, aff'g 131 Minn. 496, 155 N. W. 1103; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L.

facts in the Branson case that the engines and cars were exclusively devoted and assigned to interstate commerce while being painted in the terminal yards between trips. However, had the proof disclosed that the engines and cars had been so exclusively devoted and assigned to interstate commerce, no doubt the court would have held that the employe, while painting them, was engaged in interstate commerce. The Netherton case, cited *supra*, is not in conflict with the Branson case as it there appeared that the bridge was permanently devoted to interstate traffic and actually in use in moving interstate traffic. An employe of a carrier engaged in painting an interlocking tower was not within the federal act while returning to the tower on a speeder with some paint to continue his work.<sup>97</sup> The decision of the court in the Jackson case was no doubt correct for the reason that the work of painting an interlocking tower constituted the same class of work as that of employes repairing roundhouses, station buildings, repairing shops, etc.<sup>98</sup>

**§ 494. Linemen Repairing Telegraph and Telephone Lines of Interstate Carriers.** Telegraph and telephone lines are maintained by railroad companies near to and parallel with their tracks partly for the purpose of enabling train dispatchers to transmit train orders and thereby direct the movement of interstate trains. A telephone or telegraph line is, therefore, just as essential to the operation of a railroad as cars, tracks or other equipment. Employes engaged in repairing such telegraph and telephone lines are employed in interstate commerce within the meaning of the act, for their work

Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992, *aff'g* (Mo. App.), 180 S. W. 443; *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436, 36 Sup. Ct. 188, *aff'g* 214 N. Y. 413, Ann. Cas. 1916E 467, 108 N. E. 644; *Delaware, L. & W. R.*

*Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902.

97. *Jackson v. Industrial Board of Illinois*, 280 Ill. 526, 117 N. E. 705.

98. Section 483, *supra*.

is directly and immediately connected with the work of interstate commerce.<sup>99</sup>

99. Coal & Coke R. Co. v. Deal, 145 C. C. A. 490, 231 Fed. 604; Southern Pac. Co. v. Industrial Acc. Commission of California, 174 Cal. 19, 161 Pac. 1143; Collins v. Michigan Cent. R. Co., 193 Mich. 303, 159 N. W. 535.



## CHAPTER XXV

### INTERSTATE STATUS OF TRAIN AND SWITCHING CREWS.

- Sec. 495. Trainmen on Interstate Trains are Employed in Interstate Commerce.
- Sec. 496. When Trainmen are not Engaged in Interstate Commerce.
- Sec. 497. Employes Preparing Interstate Trains for Movement.
- Sec. 498. Beginning and Termination of Federal Control over Crews on Trains Carrying Interstate Commerce.
- Sec. 499. Interstate Employment of Train Crews on Return Trip not Shown by Proof that Train on Outgoing Trip Carried Interstate Freight.
- Sec. 500. Train and Switching Crews "Making Up" and "Breaking Up" Interstate Trains in Railroad Yards.
- Sec. 501. Switching Cars Containing Intrastate Shipments into or out of Interstate Trains—Early Conflicting Rulings.
- Sec. 502. Status of Such Employes Finally Held to be Under Federal Control.
- Sec. 503. Test in Determining when Switching Crews are Employed in Interstate Commerce.
- Sec. 504. Doctrine of Behrens Case as to Interstate Status of Switching Crews Reaffirmed and Applied.
- Sec. 505. Exceptions to Rule that Switching Crews Moving Intrastate Cars Exclusively are Governed by State Law.
- Sec. 506. Switching Movements of Empty Cars in Railroad Yards to be Loaded with Interstate Freight.
- Sec. 507. Weighing of Cars Containing Interstate Freight after Unloading to Determine Weight of Contents.
- Sec. 508. Switching Movement of Cars After Termination of Interstate Journey or After Receipt by Consignee.
- Sec. 509. Switching Cars Loaded with Interstate Freight for Repairs.
- Sec. 510. Local Movement of Cars in Yard Between Completion of one Interstate Trip and Commencement of Another.
- Sec. 511. Exceptions to Rule that Delivery of Car at Destination Ends Its Interstate Status.
- Sec. 512. Switching Movement of Car of Lumber to be Used in Repairing and Building Cars Used in Interstate Commerce.
- Sec. 513. Employes Making up Train of Another Company for an Interstate Run Over the Latter's Track.
- Sec. 514. Illustrative Cases Showing Employment of Switching Crews in Interstate Commerce.

**§ 495. Trainmen on Interstate Trains are Employed in Interstate Commerce.** Engineers, firemen, conductors, brakemen, flagmen, baggagemen, and other em-

ployes working on interstate trains, are employed in interstate commerce within the meaning of the act.<sup>1</sup> A

1. **United States.** Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 60 L. Ed. 1102, 36 Sup. Ct. 620; Southern R. Co. v. Gray, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; Baugham v. New York, P. & N. R. Co., 241 U. S. 237, 60 L. Ed. 977, 36 Sup. Ct. 592, 13 N. C. C. A. 138; Kansas City Southern R. Co. v. Jones, 241 U. S. 181, 60 L. Ed. 943, 36 Sup. Ct. 513; Illinois Cent. R. Co. v. Skaggs, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249; Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. 180; Kanawha & M. R. Co. v. Kerse, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; Southern R. Co. v. Lloyd, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; Great Northern R. Co. v. Otos, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. Ed. 1303, 35 Sup. Ct. 781; New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1; Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. Ed. 1099, 34 Sup. Ct. 696; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; Southern R. Co. v. McGuin, 153 C. C. A. 447, 240 Fed. 649; Waters v. Guile, 148 C. C. A. 298, 234 Fed. 532; Peek v. Boston & M. R. R., 223 Fed. 448; Shanley v. Philadelphia & R. R. Co., 221 Fed. 1012; Bay v. Merrill & Ring Lumber Co., 211 Fed. 717.
- Arkansas.** St. Louis, I. M. & S. R. Co. v. Stewart, 124 Ark. 437, 187 S. W. 920; Kansas City Southern R. Co. v. Livesay, 118 Ark. 304, 177 S. W. 875.
- Connecticut.** Hubert v. New York, N. H. & H. R. Co., 90 Conn. 261, 96 Atl. 967.
- Florida.** Seaboard Air Line Ry. Co. v. Hess, — Fla. —, 74 So. 500; Louisville & N. R. Co. v. Rhoda, — Fla. —, 74 So. 19.
- Georgia.** Seaboard Air Line Ry. Co. v. McMichael, 143 Ga. 689, 85 S. E. 891.
- Illinois.** Walton v. Pryor, 276 Ill. 563, 115 N. E. 2.
- Indiana.** Cincinnati, H. & D. R. Co. v. Gross, — Ind. —, 114 N. E. 962; Chicago & E. R. Co. v. Feightner, — Ind. App. —, 114 N. E. 659.
- Iowa.** Kenyon v. Illinois Cent. R. Co., 173 Iowa 484, 155 N. W. 810; Bruckshaw v. Chicago, R. I. & P. R. Co., 173 Iowa 207, 155 N. W. 273.
- Kansas.** Bumstead v. Missouri Pac. R. Co., 99 Kan. 589, L. R. A. 1917E 734, 162 Pac. 347; Saar v. Atchison, T. & S. F. R. Co., 97 Kan. 441, 155 Pac. 954; Smith v. St. Louis & S. F. R. Co., 95 Kan. 451, 148 Pac. 759; Thornbro v. Kansas City, M. & O. R. Co., 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.
- Kentucky.** Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co., 172 Ky. 55, 188 S. W. 1061; Norfolk & W. R. Co. v. Short's Adm'r, 171 Ky. 647, 188 S. W. 786; Chesapeake & O. R. Co. v. Shaw, 168 Ky. 537, 182 S. W. 653; Cincinnati,

brakeman killed while helping to move an interstate

**N. O. & T. P. R. Co. v. Tucker**, 168 Ky. 144, 181 S. W. 940; **Chesapeake & O. R. Co. v. Kornhoff**, 167 Ky. 353, 180 S. W. 523; **Louisville & N. R. Co. v. Holloway's Adm'r**, 163 Ky. 125, 173 S. W. 343; **Nashville, C. & St. L. R. Co. v. Banks**, 156 Ky. 609, 161 S. W. 554.

**Michigan.** **Holmberg v. Lake Shore & M. S. R. Co.**, 188 Mich. 605, 155 N. W. 504; **Fernette v. Pere Marquette R. Co.**, 175 Mich. 653, 144 N. W. 834; **Fernette v. Pere Marquette R. Co.**, 175 Mich. 653, 141 N. W. 1084.

**Minnesota.** **Davis v. Chicago, R. I. & P. R. Co.**, 134 Minn. 49, 158 N. W. 911; **Burke v. Chicago & N. W. R. Co.**, 131 Minn. 209, 154 N. W. 960; **Peery v. Illinois Cent. R. Co.**, 123 Minn. 264, 143 N. W. 724.

**Mississippi.** **Yazoo & M. V. R. Co. v. Mullins**, 114 Miss. 343, 76 So. 147.

**Missouri.** **Noel v. Quincy, Q. & K. C. R. Co.**, (Mo. App.), 182 S. W. 787; **Delano v. Roberts**, (Mo. App.), 182 S. W. 771; **Hearst v. St. Louis, I. M. & S. R. Co.**, 188 Mo. App. 36, 173 S. W. 86; **Thompson v. Wabash R. Co.**, 262 Mo. 468, 171 S. W. 364; **Moliter v. Wabash R. Co.**, 180 Mo. App. 84, 168 S. W. 250; **Rich v. St. Louis & S. F. R. Co.**, 166 Mo. App. 379, 148 S. W. 1011.

**Nebraska.** **Henderson v. Union Pac. R. Co.**, 100 Neb. 734, 161 N. W. 267; **Phillips v. Union Pac. R. Co.**, 100 Neb. 157, 158 N. W. 966.

**New Hampshire.** **Castonia v. Maine Cent. R. R.**, — N. H. —, 100 Atl. 601; **Topore v. Boston & M. R. R.**, — N. H. —, 100 Atl. 153.

**New Jersey.** **Wilczynski v. Pennsylvania R. Co.**, — N. J. L. —, 100 Atl. 226.

**New York.** **Daley v. Boston & M. R. R.**, 166 N. Y. Supp. 840; **McAuliffe v. New York Cent. & H. River R. Co.**, 172 N. Y. App. Div. 597, 158 N. Y. Supp. 922; **Swartwood v. Lehigh Valley R. Co.**, 169 N. Y. App. Div. 759, 155 N. Y. Supp. 778; **Hober v. New York & P. R. Co.**, 220 N. Y. 613, 115 N. E. 1041; **White v. Lehigh Valley R. Co.**, 220 N. Y. 131, 115 N. E. 439.

**North Carolina.** **Sears v. Atlantic Coast Line R. Co.**, 169 N. C. 446, 86 S. E. 176.

**North Dakota.** **Hein v. Great Northern R. R.**, 34 N. D. 440, 159 N. W. 14.

**Oklahoma.** **Chicago, R. I. & P. Ry. Co. v. Hughes**, — Okla. —, 166 Pac. 411.

**Pennsylvania.** **Moyer v. Pennsylvania R. Co.**, 247 Pa. 210, 93 Atl. 282.

**Texas.** **Geer v. St. Louis, S. F. & T. Ry. Co.**, — Tex. —, 194 S. W. 939; **Chicago, R. I. & G. Ry. Co. v. De Bord**, — Tex. —, 192 S. W. 767; **Gulf, C. & S. F. Ry. Co. v. Cooper**, — Tex. Civ. App. —, 191 S. W. 579; **Texas & P. Ry. Co. v. Rasmussen**, — Tex. Civ. App. —, 181 S. W. 212; **Ft. Worth & D. C. Ry. Co. v. Stalcup**, — Tex. Civ. App. —, 167 S. W. 279; **Southern Pac. Co. v. Vaughn**, — Tex. Civ. App. —, 165 S. W. 885.

**Utah.** **Kipros v. Uintah R. Co.**, 45 Utah 389, 146 Pac. 292.

**Vermont.** **Lynch's Adm'r v. Central Vermont R. Co.**, 89 Vt. 363, 95 Atl. 683.

**Washington.** **Donaldson v. Great**

train, was held to be engaged in interstate commerce.<sup>2</sup> Employees of a common carrier by railroad on a train transporting freight from one station on a railway line to another station in the same state, where the freight was to be transported by other trains to another state, were engaged in interstate commerce within the meaning of the federal act.<sup>3</sup> A brakeman employed on a train running between two terminals in the same state which contained cars destined for points in other states, and injured while uncoupling two cars, was engaged in interstate commerce.<sup>4</sup> A fireman on an engine of a passenger train running from Chicago to Milwaukee and injured in Illinois, was employed in interstate commerce.<sup>5</sup> An engineer on a freight train running from a point in Missouri to another place in Arkansas and killed while enroute, was held to have been employed in interstate commerce.<sup>6</sup> Although a freight train was only operated between two terminals in the same state, yet since it transported freight from one state to another and to a foreign country, the employes on the train were engaged in interstate commerce.<sup>7</sup> A brakeman on a passenger train running from a point in Kentucky to another point in Ohio, was held to be engaged in interstate commerce.<sup>8</sup> An employe working in the capacity of a brakeman and freight shifter on a freight train running from Harlem, N. Y., to Stamford, Conn., and injured while engaged in

Northern R. Co., 89 Wash. 161, 154 Pac. 133.

West Virginia. Findley v. Coal & Coke R. Co., 76 W. Va. 747, 87 S. E. 198.

Wisconsin. Reul v. Wisconsin Northwestern Ry. Co., — Wis. —, 163 N. W. 189.

2. Hearst v. St. Louis, I. M. & S. R. Co., 188 Mo. App. 36, 173 S. W. 86; Vaughan v. St. Louis & S. F. R. Co., 177 Mo. App. 155, 164 S. W. 144.

3. United States v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624.

4. Nashville, C. & St. L. R. Co.

v. Banks, 156 Ky. 609, 161 S. W. 554.

5. Rowlands v. Chicago & N. W. R. Co., 149 Wis. 51, Ann. Cas 1916E 714, 135 N. W. 156.

6. St. Louis, I. M. & S. R. Co. v. Conley, 110 C. C. A. 97, 187 Fed. 949.

7. Northern Pac. R. Co. v. State ex rel. Atkinson 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. 160, rev'g 53 Wash. 673, 17 Ann. Cas. 1013, 102 Pac. 876.

8. Cincinnati, N. O. & T. P. R. Co. v. Goode, 155 Ky. 153, 159 S. W. 695; s. c., 153 Ky. 247, 154 S. W. 941.



the transfer of freight from one car to another upon the train, was governed by the federal act as to his right to recover judgment against the carrier.<sup>9</sup> A crew in charge of a passenger train upon the conclusion of an interstate run and after all the passengers had been discharged at a station, following a daily custom, removed the train from the station to the railroad yards where it would remain over night. While assisting in placing the train on a side track in the yards, the baggageman was injured. He was still employed in interstate commerce as it was a part of the interstate trip to place the train in the yards preparatory to another interstate trip on the next morning.<sup>10</sup>

**§ 496. When Trainmen are not Engaged in Interstate Commerce.** If, at the time of the accident, the injured employe was engaged in intrastate commerce, his remedy is governed exclusively by the laws of the state where the casualty occurred. Trainmen, such as engineers, firemen, flagmen, baggagemen, brakemen, porters and conductors, are not employed in interstate commerce when they are assisting *exclusively* in the movement of intrastate traffic.<sup>11</sup> For instance, when they are

9. *Hubert v. New York, N. H. & H. R. Co.*, 90 Conn. 261, 96 Atl. 967.

10. *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653.

11. *United States*. Illinois Cent. R. Co. v. Peery, 242 U. S. 292, 61 L. Ed. 309, 37 Sup. Ct. 122; *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865, 36 Sup. Ct. 486; *Pryor v. Bishop*, 148 C. C. A. 25, 234 Fed. 9; *Boyle v. Pennsylvania R. Co.*, 142 C. C. A. 558, 228 Fed. 266; *Shanley v. Philadelphia & R. R. Co.*, 221 Fed. 1012; *Pennsylvania R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748.

*Alabama*. *Western Ry. of Alabama v. Mays*, 197 Ala. 367, 72 So. 641.

*Arkansas*. *St. Louis, I. M. & S. R. Co. v. Coke*, 118 Ark. 49, 175 S. W. 1177.

*Indiana*. *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659.

*Kentucky*. *Louisville & N. R. Co. v. Strange's Adm'x*, 156 Ky. 439, 161 S. W. 239.

*Missouri*. *Kiser v. Metropolitan St. Ry. Co.*, 188 Mo. App. 169, 175 S. W. 98; *Miller v. Kansas City Western R. Co.*, 180 Mo. App. 371, 168 S. W. 336.

*Montana*. *McBain v. Northern Pac. R. Co.*, 52 Mont. 578, 160 Pac. 654.

*New Hampshire*. *Cantin v. Glen Junct. Transfer Co.*, — N. H. —, 96 Atl. 303.

employed on a train containing *only* traffic billed between two points in one state, the line between the two points being wholly within the state, they are engaged in intrastate commerce. As a matter of fact, however, in the practical operation of railroads, trains running between two terminals, containing only intrastate commerce, that is, traffic originating in and being destined to a point in the same state, are seldom operated, as the examination of conductors' wheel reports will disclose, and, as a rule, every train carries interstate freight. If a train has a single shipment of interstate freight, then all the employes working on that train are engaged in interstate commerce. Notwithstanding, trains, as a rule, carry interstate commerce, cases have been passed upon, in which the courts have held, and properly so, that the employe's remedy was governed exclusively by the state law, because of the fact that the train on which he was working contained only intrastate shipments.<sup>12</sup> For instance, a switching crew for a railroad company worked sometimes during the day in transporting interstate shipments and at other times in hauling intrastate freight. The plaintiff was a member of this switching crew working on a short line terminating at a smelt-

**New York.** Hoag v. Ulster & D. R. Co., 177 N. Y. App. Div. 433, 164 N. Y. Supp. 529; Fairchild v. Pennsylvania R. Co., 170 N. Y. App. Div. 135, 155 N. Y. Supp. 751; Norton v. Erie R. Co., 163 N. Y. App. Div. 466, 148 N. Y. Supp. 769.

**North Dakota.** Hein v. Great Northern R. R., 34 N. D. 440, 159 N. W. 14.

**Oklahoma.** Atchison, T. & S. F. R. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545, 145 Pac. 1148.

**Texas.** Missouri, K. & T. Ry. Co. of Texas v. Pace, — Tex. Civ. App. —, 184 S. W. 1051; Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex. Civ. App. —, 182 S. W. 83.

**West Virginia.** Watts v. Ohio

Valley Elec. R. Co., 78 W. Va. 144, 88 S. E. 659.

12. Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646. 10 N. C. C. A. 153, Ann. Cas. 1914C 163; Southern R. Co. v. Murphy, 9 Ga. App. 190, 70 S. E. 972; Louisville & N. R. Co. v. Strange's Adm'x, 156 Ky. 439, 161 S. W. 239; Wright v. Chicago, R. I. & P. R. Co., 94 Neb. 317, 143 N. W. 220.

A freight conductor was injured while operating a train between two points in the same state, which consisted solely of an engine and the waycar. The train crew of which this conductor was a member, was not returning from a trip after hauling

ing works. This crew made three or four trips a day out to the main line hauling cars containing both intrastate and interstate shipments. At other times while on duty they were engaged in switching the coal and coke cars from what were known as the "coke tracks" to other points nearby, all in the same state. The plaintiff was injured while employed in assisting in the transportation of the intrastate shipments, and the court held that he was engaged solely in intrastate commerce at the time and that his remedy was governed exclusively by the laws of the state where the casualty occurred.<sup>13</sup> A switchman, assisting in the movement of empty passenger cars after reaching a terminal, which had been used exclusively in transporting intrastate passengers, was held to have been, while so engaged, not employed in interstate commerce.<sup>14</sup> A car inspector, preparing to inspect a passenger train, running between two points in the same state, and carrying no interstate passengers, was not engaged in interstate commerce.<sup>15</sup> A fireman on a pusher engine belonging to a carrier whose lines were confined within one state, assisted in moving a train containing coal and through freight from a terminus to an intermediate station on the line. Upon the conclusion of this service, the engine returned part way and assisted in moving another train carrying milk up a grade to the same station. The engine was then ordered to return and assist in moving an extra passenger train, and, while so returning, the fireman was killed in a collision between his engine and the passenger train.

empty or loaded cars between the states, but was returning without transporting any commerce from one state to another. Under these facts, the court said: "They were carrying instrumentalities which had been and probably would be used in the future for interstate and intrastate transportation combined, or only for intrastate purposes, or perchance for interstate commerce only. I cannot find that it has been decided that such act

constitutes interstate commerce, but it has been in principle decided that it does not." *McAuliffe v. New York Cent. & H. River R. Co.*, 164 N. Y. App. Div. 846, 150 N. Y. Supp. 512.

13. *Southern R. Co. v. Murphy*, 9 Ga. App. 190, 70 S. E. 972.

14. *Patry v. Chicago & W. I. R. Co.*, 265 Ill. 310, 106 N. E. 843, rev'g 185 Ill. App. 361.

15. *Boyle v. Pennsylvania R. Co.*, 142 C. C. A. 558, 228 Fed. 266.



The court held that his employment in connection with the two freight trains—conceding that they contained interstate shipments—had terminated at the time of his death so that a recovery under the federal act on that ground could not be sustained.<sup>16</sup>

**§ 497. Employes Preparing Interstate Trains for Movement.** Employes of a railroad company while doing any act within the scope of their employment necessary or expedient to prepare interstate trains for movement, and directly connected therewith, are employed in interstate commerce within the terms of the federal act.<sup>17</sup> Thus, an engineer in charge of an engine used

16. *Hoag v. Ulster & D. R. Co.*, 177 N. Y. App. Div. 433, 164 N. Y. Supp. 529.

17. **United States.** *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Southern R. Co. v. Lloyd*, 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210; *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1; *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172; *Clark v. Erie R. Co.*, 230 Fed. 478; *Hogan v. New York Cent. & H. River R. Co.*, 139 C. C. A. 328, 223 Fed. 890, 12 N. C. C. A. 1050.

**Alabama.** *Southern Ry. Co. v. Fisher*, — Ala. —, 74 So. 580; *Alabama Great Southern R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 335; *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

**Arkansas.** *Kansas City Southern R. Co. v. Miller*, 117 Ark. 396,

175 S. W. 1164; *St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

**Illinois.** *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, Ann. Cas. 1916A 778, 106 N. E. 809.

**Indiana.** *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

**Iowa.** *Bruckshaw v. Chicago, R. I. & P. R. Co.*, 173 Iowa 207, 155 N. W. 273; *Byram v. Illinois Cent. R. Co.*, 172 Iowa 631, 154 N. W. 1006; *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 153 Ky. 247, 154 S. W. 941.

**Maryland.** *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

**Minnesota.** *Davis v. Chicago, R. I. & P. R. Co.*, 134 Minn. 49, 158 N. W. 911; *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498, 150 N. W. 165.

**Missouri.** *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777; *Ritch v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.



exclusively on a division of a railroad running between two points in different states, was employed in interstate commerce while he was operating the engine on a side track in a railroad yard to determine whether it was in serviceable condition to pull an interstate train.<sup>18</sup> A fireman on a locomotive engine, inspecting, oiling, firing and preparing his engine for an interstate trip, was, while so engaged, within the protection of the national statute although he had not at the time of his injury and death, participated in assisting in the movement of any interstate freight and the engine had not been coupled to the cars of the train.<sup>19</sup> A switchman who stepped upon a defective footboard of a switch engine while engaged in making up an interstate train, was held to

**New Hampshire.** *Topore v. Boston & M. R. R.*, — N. H. —, 100 Atl. 153.

**New Jersey.** *Tonsellito v. New York Cent. & H. River R. Co.*, 87 N. J. L. 651, 94 Atl. 804.

**North Carolina.** *Sears v. Atlantic Coast Line R. Co.*, 169 N. C. 446, 86 S. E. 176; *Lloyd v. Southern R. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, 81 S. E. 1003.

**Pennsylvania.** *Falyk v. Pennsylvania R. Co.*, 256 Pa. 397, 100 Atl. 961.

**Virginia.** *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.

**Washington.** *Aldread v. Northern Pac. R. Co.*, 93 Wash. 209, 160 Pac. 429.

A fireman on a train containing interstate commerce was within the federal Act while engaged in filling the engine with water from a tank. *Texas & P. R. Co. v. Williams*, — Tex. Civ. App. —, 200 S. W. 1149.

18. *Lloyd v. Southern R. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, 81 S. E. 1003, *aff'd* in 239 U. S. 496, 60 L. Ed. 402, 36 Sup. Ct. 210, wherein the court said: "It is

insisted that the trial court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury are given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect."

19. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159. *Accord*: *Alabama Great Southern R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 335, citing *Roberts' Injuries to Interstate Employees*.

be within the terms of the act.<sup>20</sup> Applying the same principle, car inspectors looking over and inspecting cars in interstate trains have been held to be engaged in interstate commerce.<sup>21</sup> A freight conductor of a train loaded with both interstate and intrastate freight which had just been made up at a terminal, walked to the head of the train to give the engineer his clearance card and, while returning to the caboose, he walked along a scale track on which some switching was being done, and inspected the train as he walked. He was hurt on the scale track. Answering the argument of counsel that his employment did not require him to walk on this scale track, the court said: "While it may not have been his duty and was carelessness on his part, under the facts of this case, to walk upon said scale track, still we think he was engaged in interstate commerce to the extent of getting his train ready for that purpose. It seems to us that preparation was being made to have his train leave Spirit Lake and that he was engaged in getting his train ready for the transportation of freight both within the state and beyond its boundaries and that he was engaged in interstate commerce within the meaning of that term as used in said Act of Congress."<sup>22</sup> An engineer upon his engine preparing it to be attached to an interstate train for the purpose of hauling it, is engaged in interstate commerce.<sup>23</sup> An employe engaged in firing a locomotive preparatory for an interstate trip and in loading a barrel of oil thereon from an adjacent store house, was governed by the federal act.<sup>24</sup> A car inspector, injured while disconnecting the steam pipe between the engine and cars of an interstate passenger

20. *Bramlett v. Southern R. Co.*, 98 S. C. 319, 82 S. E. 501. Accord: *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4; *Carpenter v. Central Vermont R. Co.*, 90 Vt. 35, 96 Atl. 373.

21. *Dutton v. Atlantic Coast Line R. Co.*, 104 S. C. 16, 88 S. E. 263; *Atchison, T. & S. F. Ry. Co. v. Ayers*, — Tex. Civ. App. —, 192 S. W. 310.

22. *Neil v. Idaho & W. N. R. R.*, 22 Idaho 74, 125 Pac. 331.

23. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145.

24. *Tonsellito v. New York Cent. & H. River R. Co.*, 87 N. J. L. 651, 94 Atl. 804, aff'd on this point in 244 U. S. 360, 61 L. Ed. 1194, 37 Sup. Ct. 620, 14 N. C. C. A. 1072.

train in order to couple another engine thereto for the continuance of the movement of the train, was engaged in interstate commerce.<sup>25</sup> The movement of an engine from the roundhouse preparatory to attaching it to cars to be run in interstate commerce, is such that an employe engaged therein is employed in interstate commerce.<sup>26</sup>

**§ 498. Beginning and Termination of Federal Control over Crews on Trains Carrying Interstate Commerce.** The relation of master and servant, in so far as the obligation to protect the employe is concerned, ordinarily begins when the employe is necessarily on the premises of the master pursuant to his contract of employment;<sup>27</sup> but as the class of railroad employes known as train crews frequently lodge, sleep and eat in their waycars in railroad yards during hours off duty after the termination of their outgoing "runs" and before the commencement of their return trips, their status while thus off duty with reference to interstate employment is not altered by the fact that they procure their rest and sleep on the master's premises and in his equipment. For example, it has been held that train crews while asleep in their waycars in railroad yards between trips are not employed in interstate commerce.<sup>28</sup> An employe is not engaged in interstate commerce while he is dressing and getting his breakfast in the waycar before the beginning of the thirty minutes time which was to mark the commencement of his actual duties for the company.<sup>29</sup>

25. *Kansas City Southern R. Co. v. Miller*, 117 Ark. 396, 175 S. W. 1164.

26. *Byram v. Illinois Cent. R. Co.*, 172 Iowa 631, 154 N. W. 1006.

27. Section 456, *supra*, where the status of employes going to and from their work is discussed.

28. *Pryor v. Bishop*, 148 C. C. A. 25, 234 Fed. 9.

29. *Bumstead v. Missouri Pac. R. Co.*, 99 Kan. 589, L. R. A. 1917E 734, 162 Pac. 347, in which the

court said: "The plaintiff being required to report for duty 30 minutes before the time his train was to start and his time to begin, it is difficult to say how it can be accurately said that, while dressing and getting breakfast and before the beginning of the 30 minutes time which, according to his testimony, was to mark the beginning of his actual duties, he was performing any duty for the company or engaged in interstate



But an employe is deemed to be in the master's service whenever he is present to perform his duty under his contract and is subject to orders, although he may not be engaged in the actual performance of labor.<sup>30</sup> The employment of train crews does not terminate the instant the train reaches its destination in the yards, but continues for a reasonable time thereafter to enable an employe to wash and change his clothing in the way-car provided with the conveniences therefor, before going to his lodging place.<sup>31</sup> A brakeman who, after finishing his regular duties on the arrival of his train at a terminal, went to a saloon and from there started to cross over a track to go to the station to learn whether or not the conductor had further orders for him. He was injured while so crossing the track and it was held that he was engaged in interstate commerce.<sup>32</sup> In another case it appeared that an engineer came into a roundhouse with his engine at 10:30 p. m. His regular course of duty required him to leave the same place at 6:00 o'clock on the next morning. Close to the roundhouse the railroad company had a small boarding house for the convenience of its trainmen, but it was managed by a private party. The engineer after leaving his engine at the roundhouse, found the boarding house was full and he then returned into the roundhouse and, climbing into an engine, went to sleep. About 4:30 a. m. the engine in which he was asleep was taken out of the roundhouse to a coal chute in the yards. There the engineer waked up and got off of the engine. He inquired where his engine was and was told that it was in the roundhouse on a certain track. He was last seen

commerce. The time preceding the beginning of his actual duties was his own and for his use in any way he chose. The collision occurred, not while he was momentarily or temporarily diverted from the duties of his employment, but before the performance of such duties had begun. It must be held therefore, that he

was not within the terms of the act.

30. *Missouri, K. & T. Ry. Co. of Texas v. Rentz*, — Tex. Civ. App. —, 162 S. W. 959.

31. *Easter v. Virginian R. Co.*, 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

32. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.



alive going towards the roundhouse. At the time he was due to leave that morning he could not be found and his train departed without him. Later in the morning he was found in an open uncovered pit in the roundhouse, dead. His engine had been standing with the step over this pit, which was about eight feet deep. In an action for damages brought under the federal act for his death it was contended that he was not at the time employed in interstate commerce. There was evidence introduced to show that the engine when it was brought into the yard the night before needed repairs and that the rules required the engineer to inspect his engine about half an hour before leaving time. There was no evidence that the engineer was forbidden to inspect his engine before that time; but there was evidence that if the inspection at the required hour disclosed the repairs had not been made, the engine would have to be returned to the roundhouse for that purpose and that the repairs would require time and cause delay. Under these circumstances the court held that the jury was justified in finding that the engineer, at the time of his death, was employed in interstate commerce.<sup>33</sup>

**§ 499. Interstate Employment of Train Crews on Return Trip Not Shown by Proof that Train on Outgoing Trip Carried Interstate Freight.** In the operation of freight trains on steam railroads, train crews usually live and have their headquarters at division points from which they run or operate a train to another terminal or division point and then return to their headquarters with another train, the same caboose or waycar and engine frequently being used on both trips, one being known as the outgoing and the other the return trip. For the purpose of determining interstate employment, the round trip is not considered as one. The trips, both out and back, are distinct, and the fact that a train on an outgoing trip contained interstate traffic is no proof whatever to show that the train crew

33. *Padgett v. Seaboard Air Line Ry.*, 99 S. C. 364, 83 S. E. 633, aff'd in 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481.

was employed in interstate commerce on the return trip or *vice versa*. A novel attempt to show that a conductor was employed in interstate commerce on a return trip was made because his train on the outgoing trip carried interstate freight.<sup>34</sup> But this theory was rejected by the United States Supreme Court on writ of error.<sup>35</sup>

**§ 500. Train and Switching Crews "Making Up" and "Breaking Up" Interstate Trains in Railroad Yards.** The federal act governs the liability of railroad companies to employes injured while "breaking up" or "making up" trains containing interstate traffic in railroad yards; for the transportation in interstate commerce includes switching movements as well as main line traffic.<sup>36</sup> For example, a fireman on a switch engine at the

34. Peery v. Illinois Cent. R. Co., 123 Minn. 264, 143 N. W. 724, 128 Minn. 119, 150 N. W. 382, 1103.

35. Illinois Cent. R. Co. v. Peery, 242 U. S. 292, 61 L. Ed. 309, 37 Sup. Ct. 122. The court, in that case, said: "The plaintiff's journey was confined wholly to Kentucky. Only the circumstance that the south-bound train from Paducah carried freight destined to beyond Fulton caused him to be engaged in interstate commerce while on that trip. On the return, when he was injured, all the freight had domestic destinations. It is true that the greater certainty of getting traffic going south probably was the chief reason for the establishment of the circuit; but they got what they could coming back; generally a train or a part of a train. It seems to us extravagant to subordinate the northerly to the southerly journey so completely that if, on the latter, there happened to be a parcel destined beyond the state, the conductor should be regarded as still engag-

ed in commerce among the states when going from Fulton to Paducah, even though he had a full train devoted solely to domestic commerce. For it must be remembered that if the northerly movement is regarded as the incident of the southerly, that subordination is independent of the character of the commerce, and depends solely on the fact that southerly moving business, no matter what, induced establishing the route. Therefore it does not matter that the interstate traffic moving south was greater than, for purposes of illustration, we have supposed."

36. Southern Ry. Co. v. Fisher, — Ala. —, 74 So. 580; Vandalia R. Co. v. Holland, 183 Ind. 438, 108 N. E. 580.

"The plaintiff was engaged as a member of a crew at the time of the injury, making up a train to go to Meridian, Miss. A fair inference from the testimony as above indicated would be that there was a temporary lull while some of the crew went to the yard

time he was injured was engaged in shifting cars in a railroad yard. The cars which were attached to the engine at the moment of the accident were used solely in intrastate commerce, but the shifting and the movement of these cars were necessary for the purpose of making up a train to which cars were to be attached which came from points beyond the state and were destined to points in another state. The fireman's remedy was under the federal act.<sup>37</sup> A car inspector injured while coupling the air hose on a string of cars which were to become a part of a train then being made up in a yard, was employed in interstate commerce.<sup>38</sup> An engineer engaged in switching cars from a train at a terminal point preparatory to placing the cars in the yard, was within the federal act while so employed.<sup>39</sup> A member of a switching crew engaged in switching cars between two points in the city of Indianapolis for the purpose of being made up into an interstate train was employed in interstate commerce.<sup>40</sup> A switchman assisting in distributing cars from an interstate train and clearing the track for another interstate train has no remedy under a state law.<sup>41</sup>

**§ 501. Switching Cars Containing Intrastate Shipments into or out of Interstate Trains—Early Conflicting Rulings.** Whether an employe engaged in "setting out" a car containing intrastate shipments, or "picking up" a car containing such shipments from or into,

office for some purpose, and the work of making up the trains had not been completed." *Alabama Great Southern R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 235.

37. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99, aff'd in 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588. See also *Louisville & N. R. Co. v. Parker*, 242 U. S. 13, 61 L. Ed. 119, 37 Sup. Ct. 4; *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4.

38. *Atchison, T. & S. F. Ry. Co. v. Ayers*, — Tex. Civ. App. —, 192 S. W. 310.

39. *Kansas City, M. & O. Ry. Co. v. Texas v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

40. *Vandalia R. Co. v. Holland*, 183 Ind. 438, 108 N. E. 580.

41. *Koennecke v. Seaboard Air Line Ry.*, 101 S. C. 86, 85 S. E. 374, aff'd on this point in 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 165.



as the case may be, a train containing interstate traffic while such cars are detached from the train, is employed in interstate commerce, was a question which gave the courts considerable difficulty in solving, and resulted in conflicting rulings prior to a decision of the national Supreme Court in a leading case.<sup>42</sup> In the Behrens case,<sup>43</sup> in which the employee was declared to be engaged in intrastate commerce, the switching crew was engaged in moving cars all of which originated in and were destined to points in the same state so that the decision did not reach the question here presented. With the decision in the Behrens case before it, the supreme court of Kansas decided that a brakeman was employed in interstate commerce while doing such work.<sup>44</sup> In the Thornbro case a brakeman on an interstate train was required to assist in "picking up" a car standing on the siding and consigned to another point in the same state. This car, while so standing on the siding, was coupled to another car. The engine of the train was uncoupled from the train and moved to the siding and there attached to the two cars which were then pulled out from the siding upon the main line in order to place the car which was to be transported, in the train. After reaching the main line, and while the two cars were coupled up to the engine and detached from the train, the brakeman stepped between the two cars to uncouple the one that was to be taken from the other which was not to be taken. Owing to a defective coupler he was killed. The defective coupler was on the car which was to be taken into the train. Nothing appeared in the record as to the destination of the other car on the siding, except that the crew was to replace it on the siding where they found it. It was moved to the main line simply because it stood between the engine and car which was to be taken into the train. Under these facts the court held that the brakeman was engaged in interstate

42. See Section 502, *infra*.

Ann. Cas. 1914C 163.

43. Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153,

44. Thornbro v. Kansas City, M. & O. R. Co., 91 Kan. 684, Ann. Cas. 1915D 314, 139 Pac. 410.



commerce notwithstanding the fact that the car, the movement of which he was assisting at the time of his death, contained only intrastate traffic and had not become a part of or attached to the train. In another case a brakeman was employed on a train consisting partly of cars destined to points outside of the state.<sup>45</sup> The train was running between two points in Texas. At Etholine, Texas, a station on the line between the two terminals, a car loaded with merchandise originating at Dallas, Texas, was "set out" from the train for delivery on a siding at that station by making a "flying switch." The brakeman, while this car containing intrastate traffic was being switched, was standing on top of it. In performing the "flying switch," the engine and several other cars in the train, including the car mentioned, on which the plaintiff was standing, were detached from the train on the main line. During the performance of the work of switching this car on the siding, the engineer stopped the train before the car which was to be "set out" was cut loose from the other cars and the brakeman was jerked off, fell and was injured. Under those conditions, the Federal Circuit Court of Appeals held that the brakeman was not engaged in interstate commerce. The only difference between the *Thornbro* and the *Van Brimmer* cases, in so far as the feature under discussion is concerned, was that in the former the employe was assisting in switching an intrastate car into an interstate train and in the latter the employe was switching an intrastate car out of an interstate train. Of course this difference could have no force in the application of the principle and the cases are squarely in conflict. In the *Van Brimmer* case, it appeared that some of the cars contained interstate shipments as it did in the *Thornbro* case, but whether the cars which were attached to the intrastate car "set out" at the time of the accident contained interstate shipments, does not appear from the reported opinion any more than the interstate or intrastate character of the other car attached

45. *Van Brimmer v. Texas & P. Ry. Co.*, 190 Fed. 394.

to the intrastate car in the Thornbro case. Of course, if it appeared that the other car attached to the intrastate car in the Thornbro case, at the moment of the accident or the other car attached to the intrastate car in the Van Brimmer case, contained interstate commerce, then unquestionably the employe was engaged in interstate commerce under other rulings of the national Supreme Court. In another case a brakeman was injured through the negligence of a fellow servant while on a sidetrack setting out cars containing only intrastate traffic, although the train on which he was working contained interstate shipments. It was held that his work on the sidetrack was an incident to the operation of the entire train in interstate commerce.<sup>46</sup> It was held in another case that a fireman engaged in switching intrastate cars to be put in a train composed partly of cars containing interstate shipments, was employed in interstate commerce so that his remedy under the federal act was exclusive.<sup>47</sup> It would seem on principle that employes engaged in picking up or setting out intrastate cars at stations between terminals out of or into interstate trains, are engaged in interstate commerce, notwithstanding the fact that the car is detached from the train and on a siding at the time of the injury.<sup>48</sup> A train employe is either employed in interstate commerce or intrastate commerce. He cannot, in the sense of determining liability under the federal act, be employed in both kinds of commerce at the same time so as to have a choice of remedy. Now under the conditions described, if the employe is engaged in intrastate commerce, when

46. *Carr v. New York Cent. & H. River Co.*, 77 N. Y. Misc. 346, 136 N. Y. Supp. 501. The case in the preceding note was called to the attention of the court in the Carr case, but the court held it to be in conflict with other federal decisions and refused to follow it. See next paragraph for decision of United State Supreme Court in the Carr case.

47. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.

48. *Chicago & E. R. Co. v. Feightner*, — Ind. App. —, 114 N. E. 659; *Sears v. Atlantic Coast Line R. Co.*, 169 N. C. 446, 86 S. E. 176; *Carpenter v. Central Vermont R. Co.*, 90 Vt. 35, 96 Atl. 373.

does the interstate character of his employment end? Is it when the car while still standing where it was when it was a part of the interstate train, is uncoupled? Or is it when it has left the main line? The entire act of switching intrastate cars from the time of the uncoupling to the delivery on the siding, it seems, is so much a part of the work in the movement of that interstate train and so directly connected with that movement that the employe so engaged, should be held to be employed in interstate commerce. Indeed such employes' connection with interstate commerce while even on the siding, is as direct and immediate as the work of employes at terminals in preparing interstate trains for movement or in moving materials or instrumentalities to be used on interstate trains, or yard clerks checking incoming trains in the switching yards after arrival at terminals and after the train employes have left the yards.<sup>49</sup>

**§ 502. Status of Such Employes Finally Held to be Under Federal Control.** But the doubt and uncertainty arising from the conflicting opinions of the courts discussed in the foregoing paragraph as to the interstate status of train employes "picking up" or "setting out" cars containing intrastate commerce from interstate trains, was removed by the controlling opinion of the national Supreme Court in *New York Cent. & H. River R. Co. v. Carr*,<sup>50</sup> in holding that a brakeman, while cutting out an intrastate car from an interstate train was under federal control. The court said: "The railroad company insists, that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr while working thereon was

49. *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C 159; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C 156; *Neil v. Idaho & W. N. R. R.*, 92 Idaho 74, 125 Pac. 331.

50. 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1.

A brakeman engaged in switching an intrastate car from a side-track into an interstate train is employed in interstate commerce. *Daley v. Boston & M. R. R.*, 166 N. Y. Supp. 840.



engaged in intrastate commerce and not entitled to recover under the federal Employers' Liability Act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the State from interstate business. The present case is an instance of that kind—and many arguments have been advanced by the Railway Company to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employe at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip he is entitled to the benefits of the federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *St. Louis, etc., Ry. v. Seale*, 229 U. S. 156; *North Carolina R. R. v. Zachary*, 232 U. S. 248. This case is within the principle of those two decisions. The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employes, on its interstate journey. The case is entirely different from that of *Ill. Cent. R. R. v. Behrens*, 233 U. S. 473, for there the train of empty cars was running between two points in the same State. The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time



of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury and the judgment in his favor must be affirmed."

**§ 503. Test in Determining when Switching Crews are Employed in Interstate Commerce.** The ordinary and usual test in determining whether switching crews employed in railroad yards are engaged in interstate commerce is whether at the very moment of the accident they are assisting in moving interstate traffic, that is, cars either loaded or empty, originating in one state and destined to a point in another state, territory or foreign country.<sup>51</sup> In the Behrens case, cited in the notes,

51. **United States.** Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 60 L. Ed. 324, 36 Sup. Ct. 126, 11 N. C. C. A. 165; Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4; Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153, Ann. Cas. 1914C, 163, rev'g 192 Federal 581; Clark v. Erie R. Co., 230 Fed. 478; Shanley v. Philadelphia & R. R. Co., 221 Fed. 1012.

**Alabama.** Alabama Great Southern R. Co. v. Skotzy, 196 Ala. 25, 71 So. 335.

**Indiana.** Chicago & E. R. Co. v. Feightner, — Ind. App. —, 114 N. E. 659; Vandalia R. Co.

v. Holland, 183 Ind. 438, 108 N. E. 580.

**Iowa.** Bruckshaw v. Chicago, R. I. & P. R. Co., 173 Iowa 207, 155 N. W. 273.

**Kansas.** Giersch v. Atchison, T. & S. F. R. Co., 98 Kan. 452, 158 Pac. 54.

**Kentucky.** Chesapeake & O. R. Co. v. Shaw, 168 Ky. 537, 182 S. W. 653; Chesapeake & O. R. Co. v. Shamblen, 166 Ky. 789, 179 S. W. 837; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609, 161 S. W. 554.

**Michigan.** Walsh v. Lake Shore & M. S. R. Co., 185 Mich. 177, 151 N. W. 754.

a fireman on a switch engine was killed. The switching crew, of which he was a member, had been engaged

**Minnesota.** *Cramer v. Chicago, M. & St. P. R. Co.*, 134 Minn. 61, 158 N. W. 796; *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005; *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498, 150 N. W. 165; *Breske v. Minneapolis & St. L. R. Co.*, 115 Minn. 386, 132 N. W. 337.

**Missouri.** *Christy v. Wabash R. Co.*, 195 Mo. App. 232, 191 S. W. 241; *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777; *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250; *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

**New Jersey.** *Tonsellito v. New York Cent. & H. River R. Co.*, 87 N. J. L. 651, 94 Atl. 804.

**New York.** *Daley v. Boston & M. R. R.*, 156 N. Y. Supp. 840; *Ruppell v. New York Cent. R. Co.*, 171 N. Y. App. Div. 832, 157 N. Y. Supp. 1095; *Norton v. Erie R. Co.*, 163 N. Y. App. Div. 466, 148 N. Y. Supp. 769; *Barlow v. Lehigh Valley R. Co.*, 158 N. Y. App. Div. 768, 143 N. Y. Supp. 1053.

**North Carolina.** *Sears v. Atlantic Coast Line R. Co.*, 169 N. C. 446, 86 S. E. 176.

**Oklahoma.** *St. Louis & S. F. R. Co. v. Brown*, 45 Okla. 143, 144 Pac. 1075.

**Oregon.** *Montgomery v. Southern Pac. Co.*, 64 Or. 597, 47 L. R. A. (N. S.) 13, 131 Pac. 507.

**Pennsylvania.** *Moyer v. Pennsylvania R. Co.*, 247 Pa. 210, 93 Atl. 282.

**Texas.** *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939; *Kansas City, M. & O.*

*Ry. Co. of Texas v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

**Virginia.** *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.

**Washington.** *Aldread v. Northern Pac. R. Co.*, 93 Wash. 209, 160 Pac. 429; *Snyder v. Great Northern R. Co.*, 88 Wash. 49, 152 Pac. 703.

A switchman, on his way to work, was killed while crossing a railroad track in a terminal yard. He was regularly employed as a member of a switching crew. The evidence disclosed that the switch engine used by this switching crew was used indiscriminately in moving both interstate and intrastate commerce. But as there was no evidence, at the time he was killed, the decedent was engaged in interstate commerce or would assist in the switching of interstate cars when he commenced his work, it was held by the court that there could be no recovery under the Federal Employers' Liability Act. *Knowles v. New York, N. H. & H. R. Co.*, 150 N. Y. Supp. 99.

On the other hand, a switchman who had been engaged in assisting the movement of interstate cars in a terminal, was at the time he was struck by a freight train, engaged in setting switches so that the switch engine could pass from a side track to the main line. In deciding that this switchman was engaged in interstate commerce, the federal Circuit Court of Appeals for the Sixth District, said: "Did the proof sufficiently tend to show that Morford was engaged in interstate commerce? At the moment, the

in moving interstate commerce a short while before he was killed and the crew intended within a short time to

switch engine was not hauling any cars, and so the true character of the employment can be determined only by a broader view. The evidence showed that the railway company, in and about these yards, was continuously and indiscriminately hauling intrastate and interstate freight, and that, in this part of the work, no distinction whatever was made between the two classes. Describing the work of this train crew, the yardmaster's clerk said that it handled both intrastate and interstate shipments, that it handled all classes and character of freight and all kinds of cars during its working hours, and that it did the work of transferring and putting into other trains everything that came in for transfer, making no difference or distinction. When it was sought to get the cars constituting the record which would show exactly what cars had been handled that night, counsel for the railroad said: 'We admit that when these cars come in, they will show freight of every character and description, intrastate and interstate—both kinds.' In answer to the statement by plaintiff's counsel that he wished 'to show further that this character of interstate freight came in there and was handled by this train (crew) that night,' counsel for the railroad company admitted that at some time during that night this particular decedent had handled both intrastate and interstate freight, and that other freight of both kinds was coming in and going out of those yards, and that all the tracks down there were

used for the handling of both. Upon this stipulation of fact, the trial proceeded. The circumstances here are not, in all respects, the same as those found controlling in the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, or the Seale Case, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. They may also be distinguished, though we think not effectively, from the facts in the Zachary Case, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; because, in the latter case, it definitely appeared that the engine was about to be used, or was being prepared for use, in distinctly interstate commerce. The same difference and possible distinction exists with reference to *Law v. Illinois Central* (C. C. A. 6), 208 Fed. 869, 126 C. C. A. 27. However, we can draw no inference from these and other familiar decisions of the Supreme Court (including the Behrens Case, 233 U. S. 473, 477, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C 163), and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a general, indiscriminate character, not segregated and tied to shipments within the state (as in the Behrens Case, *supra*, 233 U. S. 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C 163), but applicable at least as well to the interstate commerce which the carrier is conducting. While it may not be easy in some cases to draw the



again resume the work of moving cars loaded with interstate freight. But at the time of the accident the switching crew, including the fireman, was employed in moving a train of empties from one point in New Orleans to another, all the cars in the "drag" having originated and being destined to points within the same state. Under these facts the United States Supreme Court held that the fireman, while so engaged and killed by the negligence of a co-employee, was not engaged in interstate commerce within the meaning of the act. This was the first case reaching that court under the Employers' Liability Act of 1908 in which it was held that the employee was not engaged in interstate commerce at the time of the accident. The reason, as given by the court, for so holding was that since the act provides that the servant, in order to recover, must be injured "while he is employed by such carrier in such commerce" and since the switching crew at the time was only moving intrastate cars, the fireman while so working was not within the terms of the act. This case removed a doubt and uncertainty that had therefore existed among other courts as to whether trainmen and switching cars engaged sometimes in intrastate and sometimes in interstate commerce came within the provisions of the act. The court said: "Here, at the time of the fatal injury, the interstate was engaged in moving several cars, all loaded with intrastate freight from one point of the city to another. That was not service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected, upon the completion

line between the results of this view and a breadth of construction which would make the statute invalid under the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, yet cases like the present are fairly within the line of validity. They hardly go beyond fixing the burden of proof and declaring that, where the facts show the case may well

have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary. It follows that the jury in this case had a right to find, as it did, that at the time of his death Morford was employed in interstate commerce." *Pittsburgh, C., C. & St. L. R. Co. v. Glinn*, 135 C. C. A. 46, 219 Fed. 148.



of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury. The question is correctly answered in the negative."<sup>52</sup>

**§ 504. Doctrine of Behrens Case as to Interstate Status of Switching Crews Reaffirmed and Applied.**

The question as to when members of switching crews engaged in breaking up, and making up trains and shifting cars in railroad yards, are employed in interstate commerce, was submitted to the Supreme Court nearly three years after its decision in the Behrens case, *supra*,<sup>53</sup> The principle was again reaffirmed that switching crews are not employed in interstate commerce unless at the very time of the injury, they are engaged in moving interstate freight, or performing some act so directly and immediately connected therewith as to be in fact a part of the work of moving interstate traffic or a necessary incident thereto. The state courts in that case held, under facts showing employment much closer to the boundary line between intrastate and interstate commerce than in the Behrens case, that Welsh, at the time he was injured, was employed exclusively in intrastate commerce, or at least that he was not employed in interstate commerce. Welsh was the foreman of a switching crew working at night in a terminal yard, being denominated by the court as a "yard conductor." His duties consisted in assisting in shifting cars, breaking up and making up trains under the orders of the yardmaster, to whom, upon the completion of each task, he went for further orders relative to his duties, that is, when any orders given him as to the movement of cars had been performed, he reported at the yardmaster's office for further orders. During the night, Welsh, with

52. See also *Giersch v. Atchison, T. & S. F. R. Co.*, 98 Kan. 452, 158 Pac. 54; *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939.

53. *Erie R. Co. v. Welsh*, 242 U. S. 303, 61 L. Ed. 319, 37 Sup. Ct. 116, aff'g same case reported in 89 Ohio St. 81, 105 N. E. 189.

his crew, took a freight car and a caboose from the yard in which he was working, to another yard in the same city where the car loaded with freight destined to a point in another state, was placed upon a siding so that it might be made up into a train by another crew. He then took the caboose a short distance further and placed it upon another siding. The caboose, so far as it appeared, was not to go beyond the state line. The crew then took the engine to a water plug and took on water and then returned with it to the yard where Welsh was employed. On the return journey the engine was slowed down near the yard master's office so that Welsh might report for further orders, all previous orders having been executed. While alighting from the engine at that place for that purpose, he was injured. It also appeared that the orders which Welsh would have received had he not been injured while alighting from the engine, would have required him to immediately assist in making up an interstate train. The question was presented to the courts whether Welsh, at the time he received the injury, was employed in interstate commerce, and the court was required to pass upon the question whether, under the testimony and all the admissible inferences therefrom, the question of Welsh's employment in interstate commerce should have been submitted to the jury. The state court held there was no such question raised by the foregoing facts. The Supreme Court, in holding that it was unable to conclude that the state court committed manifest error in so deciding, said: "Upon the strength of this it is argued that his act at the moment of his injury partook of the nature of the work that, but for the accidental interruption, he would have been called upon to perform. In our opinion this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, 478, 58 L. Ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153. There remains the

contention that plaintiff's act in stepping from the yard engine was in completion of his trip to the "F. D. yard" with the interstate car, and hence was itself an act in furtherance of interstate commerce. This cannot be answered by saying, in the words used *arguendo* by the state supreme court (89 Ohio St. 88), that 'he was not then and there employed in moving or handling cars engaged in interstate commerce.' The question remains whether he was performing an act so directly and immediately connected with his previous act of placing the interstate car in the "F. D. yard" as to be a part of it or a necessary incident thereto. New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 264, 59 L. Ed. 1298, 1300, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 559, 60 L. Ed. 436, 438, L. R. A. 1916C, 797, 36 Sup. Ct. Rep. 188. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task. It turns upon no interpretation of the act of Congress, but involves simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that, in the proper exercise of the jurisdiction of this court in cases of this character, the decision ought not to be disturbed."

§ 505. **Exceptions to Rule that Switching Crews Moving Intrastate Cars Exclusively are Governed by State Law.** Notwithstanding the rulings in the cases discussed in the foregoing paragraphs, there may be situations and circumstances where employes injured while assisting exclusively in the movement of intrastate cars are within the federal act; for, if such employment is but a part of a larger task in interstate commerce, or is a necessary preparatory movement in aid of interstate transportation, then the national stat-



ute applies to employees so engaged.<sup>54</sup> There is a marked difference between the mere expectation that an act done in intrastate commerce would be followed by other work of a different character in interstate commerce,<sup>55</sup> and doing an act in intrastate commerce for the purpose of furthering the work of interstate commerce.<sup>56</sup> Thus, a switchman, in order to place two cars containing interstate traffic on a private switch, found it necessary to first remove two empty cars from the switch track. The engine was uncoupled from the loaded cars for this purpose and while being used in removing the empty cars—purely in and of itself an intrastate movement—the switchman was injured. A trial court refused a request that he was not engaged in interstate commerce under those conditions and properly submitted the cause to the jury.<sup>57</sup> Again, a fireman on a switch engine in a railroad yard at the time of his injury was assisting in the movement of an empty car from one track to another. The car was not moving in interstate commerce, but the movement was necessary for the purpose of reaching and moving another interstate car, that is, it was necessary to remove the intrastate car before the interstate car could be reached. Notwithstanding that the fireman at the time was engaged purely in moving an intrastate car, the purpose of the movement as

54. *Southern R. Co. v. Puckett*, 244 U. S. 571, 61 L. Ed. 1321, 37 Sup. Ct. 703.

55. *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 Sup. Ct. 646, 10 N. C. C. A. 153, Ann. Cas. 1914C 163.

56. *Louisville & N. R. Co. v. Parker*, 242 U. S. 13, 61 L. Ed. 119, 37 Sup. Ct. 4; *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298, 35 Sup. Ct. 780, 9 N. C. C. A. 1.

57. *Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139, 36 Sup. Ct. 4, in which McReynolds,

J., said: "There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. Rep. 1021) the Circuit Court of Appeals was clearly right."



a whole controlled and, hence, he was engaged in interstate commerce.<sup>58</sup>

**§ 506. Switching Movements of Empty Cars in Railroad Yards to be Loaded with Interstate Freight.** An employe engaged in switching an empty car in a railroad yard for the purpose of loading it with interstate freight, is employed in federal commerce as distinguished from state commerce;<sup>59</sup> but if the car, at the time of the movement and injury, has not been assigned to be loaded with interstate freight, or if it is not known whether it is to be loaded with interstate freight, the employe is not within the federal statute. This rule is a corollary of the principle that the character of the movement of a car as an instrument of commerce depends on its employment at the time and not upon re-

58. *Louisville & N. R. Co. v. Parker*, 242 U. S. 13, 61 L. Ed. 119, 37 Sup. Ct. 4.

59. *United States. Shanley v. Philadelphia & R. R. Co.*, 221 Fed. 1012; *Chicago & N. W. R. Co. v. United States*, 93 C. C. A. 450, 168 Fed. 236, 21 L. R. A. (N. S.) 690.

*Arkansas. St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

*Iowa. Bruckshaw v. Chicago, R. I. & P. R. Co.*, 173 Iowa 207, 155 N. W. 273.

*Minnesota. Breske v. Minneapolis & St. P. R. Co.*, 115 Minn. 386, 132 N. W. 337.

*New Jersey. Moran v. Central R. Co. of New Jersey*, 88 N. J. L. 730, 96 Atl. 1023.

*Missouri. Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777.

*Washington. Aldread v. Northern P. Ry. Co.*, 93 Wash. 209, 160 Pac. 429.

"While in this case, deceased was engaged in switching a car to a place in defendant's yards, where, it is true, it was to be placed in a local train and taken to a station a dozen miles away, but for the purpose of being loaded that day with an interstate shipment. No sound reason can be suggested why that was not interstate service. We think it was such service in a special and immediate sense. For the use to which the car was to be put was the already ascertained service of a specific shipment into another state; and that shipment was to be made on the day the car was being shipped out of the yards for that use. The fact that it was taken out of the yards at Moberly, a few miles away, would not be different in effect, from taking it from the yards at Sturgeon."—Ellison, J. in *Christy v. Wabash*

mote probabilities or upon accidental later events.<sup>60</sup> Illustrative applications of the rule were made in the cases cited in the notes.<sup>61</sup> In the Minnesota case, the Supreme Court of that state properly held that such a switching movement was interstate in character because the object of moving the car was to load it with interstate commodities and at the time of the movement the car was assigned for that purpose. In the Illinois case, it was held that an injury sustained by an employe in the movement of an empty car to be loaded with freight was governed by the state law as it did not appear from the evidence that the car, at the time of the injury, was directed to be moved for that express purpose of loading it with merchandise to be shipped to another state. The Illinois Supreme Court correctly described the distinction as follows: "It is the contention of the plaintiff in error that inasmuch as 10 of these 15 cars, when they reached the loading platform, were loaded with meat to be shipped outside of the state, they were a part of an interstate movement from the time they were taken out of the car shops by the switching crew, and that the deceased was therefore engaged in interstate commerce at the time of his injury and was not entitled to compensation under the Illinois act. It has been held that, if the object of a switching movement is the placing of an empty car in a position to receive a load to be carried out of the state, the car is engaged in moving interstate commerce from the moment the switching movement begins. *Breske v. Minneapolis & St. Louis Railway Co.*, 115 Minn. 386, 132 N. W. 337. This is only where the switching movement is directed for the express purpose of loading the particular car with material to be shipped out of the state. In this case no particular one or more of the 15 cars were designed to be used to carry an interstate shipment at the time the

R. Co., 195 Mo. App. 232, 191 S. W. 241.

60. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed 358, 37 Sup. Ct. 170, 13 N. C. C. A 1127.

61. *Chicago Junct. R. Co. v. Industrial Board of Illinois*, 277 Ill. 512, 115 N. E. 647; *Breske v. Minneapolis & St. L. R. Co.*, 115 Minn. 386, 132 N. W. 337.

conductor of the switching crew was ordered to move them to the storage track. It was not until these cars were again moved to the loading platform, and it was known what material was ready to be loaded, that it was determined that 10 of them should be loaded for destinations outside the state and one to carry a shipment to a point within the state. The movement of the string of cars by the switching crew of which the deceased was a member was a local movement, and, as none of these cars had at that time been selected to participate in an interstate shipment, the deceased was not engaged in interstate commerce, and the circuit court properly approved and confirmed the award and decision of the Industrial Board. The icing of the cars does not change the situation. The same procedure in icing was required in all the shipments made by Armour & Co., whether interstate or intrastate, and was, in effect, a part of the equipment of the cars themselves."

**§ 507. Weighing of Cars Containing Interstate Freight after Unloading to Determine Weight of Contents.** In the handling of cars containing freight from one state to another, employes of railroad companies are frequently required to ascertain the weight of contents at the time of the final delivery. This is done by weighing the car while loaded, and again after being emptied. Employes engaged in such work are within the federal act if the cars so weighed contain traffic moving from one state to another.<sup>62</sup> "The plaintiff," said the court in the case cited, "is a citizen of Ohio. He was employed by the defendant as a brakeman on freight trains. In the regular course of its business it had delivered to a consignee in West Virginia sundry loaded cars which had come from points outside of the latter state. These cars had been unloaded. The defendant sent a train to take them back. The plaintiff was one of the crew of such train. On the switch on which these cars were there were scales. The loaded

62. *Wheeling Terminal R. Co. v. Russell*, 126 C. C. A. 519, 209 Fed. 795.



cars had been weighed at the time of delivery. In order to determine the net weight of their contents, the cars had to be weighed after they had been emptied. Such weighing was habitually done by defendant's train crew. \* \* \* The cars were being weighed to determine the net weight of the interstate load carried by them to the West Virginia consignee. Those who were engaged in ascertaining such weights were themselves employed in that commerce."

**§ 508. Switching Movement of Cars After Termination of Interstate Journey or After Receipt by Consignee.**

A switching movement which constitutes the last lap of an interstate journey is a part of interstate transportation, and employes engaged therein are under the Federal Act;<sup>63</sup> but a local movement of cars after an interstate journey is ended, is not under federal control.<sup>64</sup> Thus, a carrier transported cars containing coal to be used on its locomotives, from Sayre, Pa., to Cortland, N. Y. After being received in the Cortland yards, they remained there upon sidings and switches. About two weeks later the cars were removed to an unloading trestle at a coal chute for the purpose of placing the

63. *Jacobs v. Southern R. Co.*, 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588, aff'g 116 Va. 189, 81 S. E. 99; *Chicago, M. & St. P. R. Co. v. United States*, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A. (N. S.) 473; *Chesapeake & O. R. Co. v. Shaw*, 168 Ky. 537, 182 S. W. 653; *Easter v. Virginian R. Co.*, 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

64. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992, aff'g (Mo. App.), 180 S. W. 443; *Pennsylvania R. Co. v. Knox*, 134 C. C. A. 426, 218 Fed. 748; *Louisville & N. R. Co. v. Strange's Adm'x*, 156 Ky. 439, 161 S. W. 239; *Missouri, K. & T. Ry.*

*Co. of Texas v. Pace*, — Tex. Civ. App. —, 184 S. W. 1051; *Kansas City, M. & O. R. Ry. Co. v. Texas v. Pope*, — Tex. Civ. App. —, 152 S. W. 185.

A car loaded with interstate freight had been delivered at the mill of the consignee. After being partly unloaded, it became necessary to move the car in its partly unloaded condition; but it was again returned to complete the unloading and was then to be loaded with freight for another state. The service of the car in interstate commerce had not been completed. *Wagner v. Chicago, R. I. & P. Ry. Co.*, — Ill. —, 115 N. E. 201.



coal in the chute. During this last movement an employe was injured. Upon these facts, Mr. Justice McReynolds, of the national Supreme Court, said:<sup>65</sup> "We think their interstate movement terminated before the cars left the sidings, and that while removing them the switching crew was not employed in interstate commerce. The essential facts in *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, did not materially differ from those now presented. There we sustained a recovery by an employe, holding he was not engaged in interstate commerce; and that decision is in conflict with the conclusion of the Court of Appeals. The judgment under review must be reversed, etc." Where cars were billed from Pensacola, Fla., to Corbin, Ky., and after the final delivery at Corbin, a switchman assisting in a new and independent movement of the cars from Corbin to Barbourville, Ky., was not engaged in interstate commerce.<sup>66</sup>

**§ 509. Switching Cars Loaded with Interstate Freight for Repairs.** The Employers' Liability Act applies to switching crews engaged in transferring cars loaded with interstate freight to repair tracks for temporary repairs.<sup>67</sup> A mere delay in the movement of a car loaded with interstate freight does not result in its withdrawal from interstate commerce.<sup>68</sup> "In passing

65. *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515.

66. *Louisville & N. R. Co. v. Meador's Adm'r*, 176 Ky. 765, 197 S. W. 440.

67. *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939, wherein the court said: "If there is any question of fact involved in whether the empty box car and the oil tank car which was not proven to be loaded were being used by the carrier in interstate commerce, it would seem immaterial here, in view of the undisputed evidence that the deceased was carrying to the 'repair

track' for repair at the time he was injured the box car which was loaded with timber, and which was clearly being used by its carrier in interstate commerce. The evidence requires this conclusion. We think that when the deceased, Geer, was carrying this car to the 'repair track' for repairs he was engaged in a work so intimately connected with interstate commerce as to be practically a part of it."

68. *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124. See Section 487, *supra*, as to interstate status of employes repairing cars in transit.

upon the sufficiency of the instructions therefore, we must assume that one of the three unrepaired cars which were being replaced upon the repair track was loaded with lumber in South Dakota. There was competent evidence tending to show that fact. The question of fact was for the jury. If so loaded, that fact fixed its status for the time as an interstate car. The interstate transportation to which it was then devoted was not ended merely because the car had become temporarily disabled and was placed upon the repair track where it was awaiting its turn for repairs. While so placed and waiting it was still in interstate commerce."<sup>69</sup>

**§ 510. Local Movement of Cars in Yard Between Completion of one Interstate Trip and Commencement of Another.** A car loaded with freight, being moved from one state to another continues to be used in interstate commerce until it is delivered by a common carrier to the consignee and unloaded.<sup>70</sup> Its interstate character then ordinarily ceases. It does not acquire a new status as an interstate commerce car until it is again assigned or used by the carrier for the purpose of moving traffic in interstate commerce. A movement of the car, there-

69. *Bolch v. Chicago, M. & St. P. R. Co.*, 90 Wash. 47, 155 Pac. 422.

70. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. Ed. 1319, 34 Sup. Ct. 814; *St. Louis, I. M. & S. R. Co. v. Edwards*, 227 U. S. 265, 57 L. Ed. 506, 33 Sup. Ct. 262; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 57 L. Ed. 284, 33 Sup. Ct. 174, 46 L. R. A. (N. S.) 203; *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U. S. 286, 57 L. Ed. 226, 33 Sup. Ct. 83; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. 140; *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed.

310, 31 Sup. Ct. 279; *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. Ed. 441, 29 Sup. Ct. 246; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. Ed. 73, 11 Sup. Ct. 461; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. Ed. 287, 8 Sup. Ct. 266; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. 475; *Union Stock-Yards Co. of Omaha v. United States*, 94 C. C. A. 626, 169 Fed. 404.

"Had the injury occurred during the movement of the loaded car prior to its delivery to the consignee, there could be no question but that plaintiff would have been engaged in interstate commerce. The shipment of the brick

fore, in a terminal yard from one track to another after the conclusion of its interstate status during the first trip and before it is assigned or used in interstate commerce on the second trip, is local in character, that is, intrastate. An employe injured while handling the car in the interim between the two trips has no remedy under the Federal Employers' Liability Act. For example, a car, after an interstate cargo had been discharged from it, was taken to another point in the same state where it was left to await another order for its future movement. Such an order was given two or three hours after an accident to an employe. The court held that the plaintiff was not engaged in interstate commerce.<sup>71</sup>

**§ 511. Exceptions to Rule that Delivery of Car at Destination ends Its Interstate Status.** But, while it is true, as stated in the foregoing paragraph, that the interstate character of a car ordinarily ceases when it is delivered at the destination point to the consignee and

from Buffville, Kan., to the Coen Building Material Company at a point on defendant's line in Missouri constituted interstate commerce; and the carrying of such loaded car by defendant from Dodson, and its delivery to the consignee, was a participation by defendant in such commerce." *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777, an action under the Federal Act.

71. *Moran v. Central R. of New Jersey*, 88 N. J. L. 730, 96 Atl. 1023, in which the trial court said: "I think the interstate character of that car ceased, and I so decide, when the function that the car was performing in the interstate commerce was ended; that is, it was engaged in the purpose of carting coal from Mauch Chunk to Newark from a con-

signor to a consignee. When it had taken the last vestige of coal off of the car, and had delivered it to the consignee, I think at that point its character as an interstate commerce car ceased, and that it did not acquire a new character as an interstate commerce car until the intention on the part of the railroad company to use that car had been in some way manifested, either by act or by word." The decision in this case was affirmed by the United States Supreme Court upon the authority of *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992 and *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515. *Moran v. Central R. Co. of New Jersey*, 245 U. S. 629, 62 L. Ed. —, 38 Sup. Ct. 62 (mem. dec.).



unloaded, nevertheless where it is intended that the car, after being unloaded, shall be returned by the carrier to the initial point in another state, its interstate status continues during the entire trip.<sup>72</sup> For example, an employe of a carrier owning a line about nine miles long and wholly within one state, was assisting in the movement of an empty car after being unloaded of its interstate freight. It was contended that the employe was not thereby engaged in interstate commerce for the reason that the interstate trip of the car had been completed. But in rejecting this contention, the court said:<sup>73</sup> "However, in the case now before us, plaintiff's injury occurred after the car had been unloaded and while he was switching it preparatory to taking it back to Dodson where it could be taken possession of by the Missouri Pacific. Was the movement of this empty car a part of interstate commerce? We are of

72. *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643, in which the court said: "The car in question, having the defective coupler, was a car belonging to the Wabash Railroad Company, and known and designated as a 'foreign' car. It had been brought into Minneapolis, Minn., from the state of Wisconsin, by the Soo Railroad, delivered to the defendant loaded with coal, and by the defendant delivered to the consignee. It had been unloaded and placed upon track 23 for the purpose of being redelivered to the Soo Railroad. It was delivered to that railroad, and afterwards loaded with shingles in Minnesota, and taken by the Soo road thus loaded into Wisconsin on its return home. That it was at the time a car in use in interstate commerce is clearly sustained by the decision of the Supreme Court, in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Co. 158, 49 L. Ed. 363, in which

case it said: 'Whether cars are empty or loaded, the danger to employes is practically the same, and we agree with the observation of District Judge Shiras, in *Voelker v. Railway Co.* (C. C.) 116 Fed. 867, that 'it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.' The use of the car in question, at the time of the injury, was a use in interstate commerce within the rule thus announced. It had been brought loaded from the state of Wisconsin into the state of Minnesota, and though empty at the time of the injury was being moved by the defendant on its return from whence it came."

73. *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777.



the opinion that it was, under the circumstances disclosed by this case. In the first place, the service undertaken by the defendant when it received the loaded car from the Missouri Pacific at Dodson was not finished until it had transported the car to its consignee and had returned it empty to Dodson and placed it again at the disposal of the Missouri Pacific. Under these circumstances the particular trip of this car from Buffville, Kan., might be said not to have ended until it was returned empty to Dodson, since it was not the purpose of any one that the car, when unloaded, should remain at the point of delivery to the consignee. The return of the car to Dodson was a necessary part of the movement of any cars carrying commerce from the state of Kansas to points in Missouri on defendant's line. To enable the railroad, bringing freight from Kansas to such points, to continue that commerce, certainly the cars, after they have been received and emptied of their goods, must be returned to that road. However, there is more in the facts of this case than simply the return of the car to Dodson, and we need not go so far as to hold that its mere return to Dodson was a part of its incoming trip, and therefore a part of the interstate commerce of that trip. In this case the Missouri Pacific Road had directed that all box cars returned to Dodson should be sent to its distribution point at Osawatomie, Kan., for use in the transportation of wheat. The car in question was not one belonging to the Missouri Pacific, but belonged to the Delaware, Lackawanna & Western Railway (an eastern railroad). When the car was unloaded at the Coen Building Material Company's plant and started by defendant to Dodson, the defendant was in fact participating in its return to Kansas, where it was to again enter the stream of incoming cars used in further transportation. This westward movement was merely a completion of the circuit it was making in the transportation of the country commerce. On its return empty from the switch of its consignee, its passage through Dodson to the west was accomplished in the same way it went through Dodson east to its consignee. Dodson was no more its final destination in the

one case than in the other. The fact that the defendant took no interest in where the car was going the moment it reached Dodson, nor made any inquiry in regard thereto, ought not to make any difference in the real nature of the service then being rendered. It was then performing a service in the interstate commerce of the country. And in view of the fact that Dodson was so near the Kansas line with only one small station between it and that state, it is difficult to believe that defendant was wholly ignorant of the fact that it was helping in the interstate movement of such cars, even though its officers were careful to avoid ascertaining to what particular point in Kansas the cars were being sent. It is not the intent with which the carrier performs its work that affects the nature of the carriage; it is the service that is actually rendered. This is what determines whether it is inter- or intra-state. The empty car, having brought its load from Kansas into Missouri had entered upon its return to that state, there to be again loaded. It was an instrumentality of interstate commerce."

**§ 512. Switching Movement of Car of Lumber to be Used in Repairing and Building Cars Used in Interstate Commerce.** Employees of a railroad company engaged in switching a car loaded with lumber from a railroad yard into machine shops where the lumber was to be utilized in building and repairing cars which would thereafter be used in moving interstate commerce, are not thereby engaged in interstate commerce within the federal act.<sup>74</sup> In so deciding, the court said: "In *Minneapolis & St. Louis R. R. Co. v. Winters*, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, where an employe was injured while repairing an engine which had been used in interstate commerce, before the injury, and likewise was used afterwards, but where there was nothing to show that it was permanently or specially devoted to such commerce, or assigned to it at the time of

74. *Barnett v. Coal & Coke Ry. Co.*, — W. Va. —, 94 S. E. 150.

the injury, the court held the injured employe was not then engaged in an act of interstate commerce, and the case did not come within the federal Employers' Liability Act. Likewise, in *Chicago, etc., R. R. Co. v. Harrington*, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, it was held that an employe of an interstate carrier, engaged in removing coal from storage tracks to coal chutes, was not engaged in interstate commerce, although the coal had been previously brought from another state and was to be used by locomotives in interstate hauls. Apropos to this question, see, also *Delaware, etc., R. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. The facts presented here are much stronger to show deceased was not engaged in interstate commerce at the time of his injury than they were in the case just cited. Numerous decisions by the courts of the different states of the union, to the same effect, could be cited to support our conclusion on this point, but we deem the foregoing from the highest authority on matters relating to interstate commerce sufficient."

**§ 513. Employees Making up Train of Another Company for an Interstate Run Over the Latter's Track.** A switchman employed by one company is still engaged in interstate commerce while assisting in moving cars to be made up into a train although the cars are not owned by his immediate employer and were to be moved over the tracks of another company; for when two railroads use a common switch yard, in which the employes of one carrier form a switching crew to make up interstate trains, they are under the protection of the federal act even though they are not moving the cars of their immediate employer.<sup>75</sup>

**§ 514. Illustrative Cases Showing Employment of Switching Crews in Interstate Commerce.** Members of switching crews were held to be engaged in interstate

75. *Ruppell v. New York Cent. R. Co.*, 171 N. Y. App. Div. 832, 157 N. Y. Supp. 1095.

commerce under the following circumstances: A switchman employed in moving a car containing interstate traffic from a railroad yard to repair tracks for the purpose of repairing some of the appliances thereon, was within the federal act.<sup>76</sup> A switchman, at the time of his death, employed in switching cars loaded with merchandise originating in one state and destined to a point in another state, was held to be engaged in interstate commerce.<sup>77</sup> A brakeman on an extra freight train while "breaking up" his train at a terminal and assisting in switching a car loaded with lumber consigned to a point in another state, was engaged in interstate commerce.<sup>78</sup> A switchman injured while riding on a car in transit from Indianapolis, Ind., to East St. Louis, Ill., and which was being switched at the time to the warehouse at the point of delivery to be unloaded, was engaged in interstate commerce.<sup>79</sup> A petition in an action under the federal act declared that the defendant was a common carrier by railroad engaged in interstate commerce and had a freight yard in a town in Florida; that the decedent was an employe of the defendant in said yard as a switchman; that he was required, in the discharge of his duties, in the movement of certain cars, to uncouple the car attached to an engine; that the engine was kept at the said point to switch and move intrastate and interstate cars as the business required. It was held by a majority of the court that this declaration sufficiently alleged that, at the time of the injury, the decedent was engaged in interstate commerce, but, under the later ruling of the federal Supreme Court in the Behrens case,<sup>80</sup> no doubt the decision of the court in this case was too broad. For, if, at the time of the injury, the decedent was assisting in the movement of intrastate cars, only, his administrator would not have a remedy under the federal act. An engineer on a

76. *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. —, 194 S. W. 939.

77. *Rich v. St. Louis & S. F. R. Co.*, 166 Mo. App. 379, 148 S. W. 1011.

78. *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

79. *Hall v. Vandalia R. Co.*, 169 Ill. App. 12.

80. Section 503, *supra*.



switch engine engaged in delivering cars containing coal, which was to be used partly by locomotive engines of the railroad company employed in hauling interstate trains, was held to be engaged in interstate commerce by a state court;<sup>81</sup> but, on writ of error to the federal Supreme Court, this decision was reversed on the ground that the movement was intrastate and not interstate in character.<sup>82</sup>

81. *Barlow v. Lehigh Valley R. Co.*, 158 N. Y. App. Div. 768, 143 N. Y. Supp. 1053.

82. *Lehigh Valley R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070, 37 Sup. Ct. 515.

## CHAPTER XXVI

### INTERSTATE STATUS OF MISCELLANEOUS EMPLOYEES.

- Sec. 515. Employees Procuring Supplies and Materials to be Used on Interstate Trains.
- Sec. 516. Supplying and Moving Coal for Use of Engines Pulling Interstate Trains.
- Sec. 517. Status of Employees Dumping Coal from Chutes into Tenders of Interstate Engines.
- Sec. 518. Loading and Unloading Freight from Interstate Trains Constitutes Work in Interstate Commerce.
- Sec. 519. Status of Watchmen, Detectives and other Employees doing Police Duties.
- Sec. 520. Yard Clerks Engaged in Interstate Commerce, When.
- Sec. 521. Servants of Railroad Companies Handling United States Mail in Connection with Interstate Trains.
- Sec. 522. Agents of Express Companies.
- Sec. 523. Interstate Status of Express Messengers Employed Jointly by Railroad and Express Companies.
- Sec. 524. Pullman Employees.
- Sec. 525. Miscellaneous Employees.

**§ 515. Employees Procuring Supplies and Materials to be Used on Interstate Trains.** Employees of a railroad company engaged in placing upon, or procuring for, interstate trains necessary supplies and materials are, ordinarily, engaged in interstate commerce within the federal act. For example, a porter on a passenger train, when injured, was lifting cakes of ice for a water cooler in a coach of a train. The passengers on the train, with the exception of two travelling from one state to another, were making intrastate trips. It was held, and properly so, that the porter was employed in interstate commerce.<sup>1</sup> A brakeman injured by falling into a cinder

1. *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033, wherein the court said: "Appellee's employment had direct relation to the commerce, to wit, the two interstate passengers which the train in question transported. The service performed directly contributed to the comfort and

necessity, not only of the local, but of the interstate passengers; and we, therefore, think that his employment comes well within the authorities on the subject that we have been able to find." Citing *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893; *Colasurdo v. Central R. R. of New Jersey* 180 Fed. 832;

pit while he was walking over a railroad yard looking for a tool boy to get a tin cup for the caboose of an interstate train on which he was about to leave a terminal, was engaged in interstate commerce.<sup>2</sup> An employe engaged in dumping coal from a coal chute into the tender of an engine which was then being prepared for the purpose of taking a passenger train from Missouri into Kansas, was engaged in interstate commerce.<sup>3</sup> A railroad employe injured while loading tobacco into a car which was to be transported into another state, was held to have a remedy under the federal act.<sup>4</sup> A brakeman carrying ice in a railroad yard to cool a hot box of a car in an interstate train, was held to be engaged in federal commerce.<sup>5</sup> An employe of a railroad company engaged in putting a barrel of oil on an interstate train, was within the federal act.<sup>6</sup> But a brakeman going from his caboose to the yard office to present a requisition for supplies needed on the caboose whenever it should be called into service for the next trip, was not engaged in interstate commerce when it did not appear that the train on its next trip would carry interstate traffic.<sup>7</sup> "He had completed his previous run," said the court in the last case cited, "some hours before, and anticipating that he would be again called into service soon after noon on the 15th, but whether to handle interstate or purely local freight he had no means of knowing, as he had not been called for duty; his train had not been made up, and his caboose was on a siding in the yard awaiting assignment. The action was brought under the Federal Employers' Liability Act (35 Stat. at L. 65), and plaintiff assumed the bur-

Troxell v. Delaware, L. & W. R. Co., 180 Fed. 871.

2. Baltimore & O. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060, aff'd in 242 U. S. 169, 61 L. Ed. 228, 37 Sup. Ct. 33.

3. Armbruster v. Chicago, R. I. & P. R. Co., 166 Iowa 155, 147 N. W. 337.

4. Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311.

5. Illinois Cent. R. Co. v. Nelson, 122 C. C. A. 258, 203 Fed. 956.

6. Tonsellito v. New York Cent. & H. River R. Co., 87 N. J. L. 651, 94 Atl. 804, aff'd in 244 U. S. 360, 61 L. Ed. 1194, 37 Sup. Ct. 620, 14 N. C. C. A. 1072.

7. McBain v. Northern Pac. R. Co., 52 Mont. 578, 160 Pac. 654.

den of pleading and proving that at the time he was injured he was engaged in interstate commerce. The allegation of his complaint is sufficient, but does his proof sustain it? The record presents a federal question, and the decisions of the United States Supreme Court upon it are conclusive upon this court. Under a state of facts substantially identical with the facts before us, that court held that it is immaterial that the injured party may have been engaged in interstate commerce immediately before he was injured, or that immediately after completing his then present task he would again engage in interstate commerce, and said: 'The true test is the nature of the work being done at the time of the injury.' *Illinois Cent. R. R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. Applying that test to the facts presented here, and it is apparent at once that plaintiff has failed to make out his case under the federal statute. The character of the supplies he sought furnishes no index to his employment. The fuses, torpedoes, and waste were necessary supplies for his caboose, whether it would be employed in interstate or intrastate commerce, and at the time of his injury it was impossible to determine the character of his next assignment, for he had not then been called to duty; the train to which his caboose would be attached had not then been made up and the caboose had not been assigned. Under the interpretation placed upon this statute by the Supreme Court of the United States, it is of no consequence that the work performed by plaintiff had to do with interstate commerce to a much greater extent than with purely local shipments. The Congress doubtless had authority, under the commerce clause of the constitution, to impose upon a carrier engaged in both interstate and intrastate traffic liability for an injury sustained by its employe in the course of its general work, whether the 'particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce' (*Behrens Case*, above); but Congress did not see fit to exercise its authority to that extent. The act in question provides: 'that every common carrier by railroad



while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,' etc. In further consideration of this feature of the statute the court in the case above said: Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce.' At the time he was injured, plaintiff was not engaged in interstate commerce within the meaning of the federal Employers' Liability Act as construed by the highest court of the land." A brakeman engaged in filling the lamps and lanterns and sweeping the floor of the caboose in preparation for an interstate run, is engaged in interstate commerce.<sup>8</sup> The work of an employe in supplying the engines running from points in Michigan to points in Ohio and *vice versa*, with sand and oil, constitutes employment in interstate commerce.<sup>9</sup> A member of a switching crew, at the time he received an injury, was on his way with the engine to a water tank to get water. Just before the injury he had been engaged in switching cars and making up trains containing interstate shipments. It was necessary to obtain water for the engine so as to be able to return to the work of switching both interstate and intrastate cars. The movement of the switch engine to procure water for the handling of interstate traffic thereafter governed the status of plaintiff's employment, and he was held to have a remedy under the Federal Act.<sup>9a</sup>

**§ 516. Supplying and Moving Coal for Use of Engines Pulling Interstate Trains.** The status of employes with reference to interstate or intrastate employment in assisting in supplying or in moving coal between

8. *Davis v. Chicago, R. I. & P. R. Co.*, 134 Minn. 49, 158 N. W. 911. — Mich. —, 166 N. W. 667.

9a. *Macon, D. & S. R. Co. v. Robinson*, — Ga. App. —, 91 S. E. 492.

9. *Guy v. Cincinnati, N. R. Co.*,

points in one state for the use of engines pulling interstate traffic depends upon whether, at the time of an injury, the work has such a direct or close connection with interstate commerce as to constitute a part of it. The law is well settled that if the work being done at the time of an injury is not a part of interstate commerce, the remedy is controlled by the state statute; but the uncertainty under our dual form of government lies in determining at what stage or point of time, coal, while being conveyed from the mine to the tender of an interstate engine, passes from the control of the state law to the federal so that the rights of an employe, when injured, or his administrator in case of death, may be ascertained.<sup>10</sup> The national Supreme Court has answered the question in a negative way. It held, for

10. *Harrington v. Chicago B. & Q. R. Co.*, (Mo. App.), 180 S. W. 443, in which Judge Trimble, in a decision subsequently approved by the Supreme Court of the United States, said: "As said in the major opinion, it is not the *indirect* effect upon interstate commerce that determines the question, else there would be little use of limiting the federal act to those cases wherein the work was *directly* connected with interstate commerce. For, if the putting of coal into the storehouse be deemed interstate commerce, where is the line of demarcation to be placed? And when does the work change from its ordinary character into that of interstate commerce? When does the coal become an 'instrumentality' of *interstate* commerce? At the mines? On the way therefrom? In the storehouse? Or does that portion only of such coal become an *instrumentality* of *interstate* commerce when it is separated, or is being separated, from the general store for the purpose of devoting it to

that commerce? It would seem that the coal would not become an instrumentality of such commerce until that time, and therefore the general work of putting coal into defendant's general storehouse should not be considered as an engagement in interstate commerce. This does not require that before anything can be considered an instrument of interstate commerce it must be used exclusively in the prosecution thereof. The coal in this case is something that can be *separated* therefrom. It is not like a bridge or the track in the roadbed, or a roundhouse used in the repair of both interstate and intrastate engines. For these do not lose their status as interstate instrumentalities when used in intrastate business. Hence they cannot be separated therefrom and must therefore be regarded as indivisible parts thereof. But, even as to these, they are not considered as instruments of interstate commerce *until they have been devoted thereto.*"

example, that an employe engaged in mining coal in a colliery owned by a railroad company, which was to be used on its locomotive engines in pulling interstate trains, was not working in interstate commerce within the meaning of the Act, for the reason that the fact the coal was to be used in the future in the movement of interstate traffic after it was mined, did not make the actual work of mining the coal a part of interstate commerce.<sup>11</sup> And it also held that a switchman was not employed in interstate commerce while he was engaged in transferring a load of coal from storage tracks into a coal chute in the same yard where the coal, when thus placed, would thereafter be used by locomotive engines pulling interstate trains, because the work of taking the coal to the chute did not have such a close or direct relation to interstate commerce as to be, in a practical sense, a part of it.<sup>12</sup> Similarly, the Kansas supreme court properly held that a fireman on an engine, injured while assisting in the movement of cars of coal belonging to his employer, from one point to another in the same state, where the coal was to be used later in firing engines pulling interstate trains, was not under the protection of the federal act.<sup>13</sup> An employe working in a coal chute assisting in elevating coal, some of which would be used in filling the tenders

11. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. 902.

12. *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. 517, 11 N. C. C. A. 992, in which the court said: "Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use." The decision of the Supreme Court in the *Harrington* case, in effect,

overrules such cases as *Barker v. Kansas City, M. & O. R. Co.*, 88 Kan. 767, 129 Pac. 1151; *Barlow v. Lehigh Valley R. Co.*, 214 N. Y. 116, 107 N. E. 814; *Kamboris v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 358, 146 Pac. 1097; *Montgomery v. Southern Pac. Co.*, 64 Ore. 597, 47 L. R. A. (N. S.) 13, 131 Pac. 507; *Horton v. Oregon-Washington R. & Nav. Co.*, 72 Wash. 503, 47 L. R. A. (N. S.) 8, 130 Pac. 897.

13. *Barker v. Kansas City, M. & O. R. Co.*, 94 Kan. 176, 146 Pac. 358.



of interstate engines, was not engaged in interstate commerce.<sup>14</sup>

§ 517. **Status of Employees Dumping Coal from Chutes into Tenders of Interstate Engines.** But after the coal is placed in the chute for the use of interstate engines, it seems that the work thereafter of filling the tenders of interstate engines with coal therefrom possesses such a close and immediate connection with interstate commerce that the rights of an employe injured in the course of such a duty would be governed by the federal and not the state law. Thus, a hostler engaged in dumping coal from the chutes into the tender of an engine which was then being prepared for the purpose of taking a passenger train from a point in Missouri to a point in Kansas, was found to be, under those circumstances, engaged in interstate commerce.<sup>15</sup> "We reach the conclusion," said the court in the last case cited, "that the deceased was employed in interstate commerce at the time of receiving the injury. True, the engine had not been attached to the train at the time, but it was being prepared for that purpose, and it was attached shortly thereafter and actually hauled freight into another state. It is suggested that the engine whose tender was being coaled was not shown to have been assigned to haul the particular train, and that the work may have been done generally, but we think any such inference was obviated by proof of the actual use made of it and the absence of evidence that engines were being so prepared generally without reference to when they were to be employed."<sup>16</sup> The supreme court

14. *Zavitovsky v. Chicago, M. & St. P. R. Co.*, 161 Wis. 461, 154 N. W. 974.

15. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337. See *Chicago, R. I. & P. R. Co. v. Bond*, 47 Okla. 161, 148 Pac. 103, in which the court held that a person dumping coal into interstate engines from chutes, was engaged in interstate commerce, but this case was reversed

on writ of error to the national Supreme Court on the ground that the decedent was, under the contract with the railroad company, an independent contractor and not an employe.—*Chicago, R. I. & P. R. Co. v. Bond*, 240 U. S. 449, 60 L. Ed. 735, 36 Sup. Ct. 403, 11 N. C. C. A. 342.

16. See *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. 305, 9 N. C. C. A.



of Alabama likewise held that an employe working in and about a coal chute and while preparing the tippie for the purpose of filling the tender of an engine pulling an interstate train, was engaged in interstate commerce.<sup>17</sup> A servant of a railroad company who, immediately before he was injured, had been assisting in coaling a switch engine which handled interstate and intrastate cars indiscriminately in a railroad yard, was not employed in interstate commerce.<sup>18</sup>

**§ 518. Loading and Unloading Freight from Interstate Trains Constitutes Work in Interstate Commerce.** The federal act governs the liability of common carriers for injuries to employes while engaged in loading or unloading freight from interstate trains. Thus, a brakeman who was shown to have been unloading from a car in a train, a barrel of oil shipped from another state when he was injured, sufficiently sustained the burden of proving that he was engaged in interstate commerce.<sup>19</sup> A truckman in the employ of a railroad company was killed while loading into a box car freight consigned to a point in another state. His administrator was properly held to have brought a suit for his death under the federal act.<sup>20</sup> An employe struck by a passenger train carrying interstate passengers, baggage and mail, was within the federal act when injured while on his way to unload mail from the train.<sup>21</sup>

**§ 519. Status of Watchmen, Detectives and other Employes doing Police Duties.** Employes of common

109, Ann. Cas. 1914C 159, in which it was held that a fireman inspecting, oiling, firing and preparing his engine for an interstate trip, was, while so engaged, within the protection of the national statute; *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 26 Sup. Ct. 624, an action under the Federal Employers' Liability Act, in which it appeared that an engineer was injured while oiling his engine in

preparation for an interstate run.

17. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

18. *Giovio v. New York Cent. R. Co.*, 176 N. Y. App. Div. 230, 162 N. Y. Supp. 1026.

19. *Western Ry. of Alabama v. Mays*, 197 Ala. 367, 72 So. 641.

20. *Illinois Cent. R. Co. v. Porter*, 125 C. C. A. 55, 207 Fed. 311.

21. *Lynch v. Boston & M. R. R.*, 227 Mass. 123, 116 N. E. 401.

carriers by railroad performing such duties as usually fall upon watchmen, detectives and police officers in protecting and guarding the property of the carrier, are not under the purview of the federal act unless they are engaged in interstate transportation or in work directly connected with or related to interstate commerce. For example, an employe of the company assisting a posse in searching for highwaymen who had robbed a train containing interstate commerce, was not engaged in interstate commerce.<sup>22</sup> A detective employed by a railroad company in its yards and killed by a train was not employed in interstate commerce in the absence of any evidence that he was then engaged in inspecting cars containing interstate traffic or aiding some other work directly connected with interstate commerce.<sup>23</sup> On the other hand, a watchman who was in charge of a dead engine in a train running from a point in Alabama to a point in Georgia and who was injured in transit, was held to have a remedy under the federal act.<sup>24</sup> A special officer employed by a common carrier by railroad who was injured just after he had removed trespassers from an interstate passenger train, was held to be employed in interstate commerce.<sup>25</sup> A watchman

22. *Alabama Great Southern R. Co. v. Bonner*, — Ala. —, 75 So. 986.

23. *Chicago, R. I. & P. R. Co. v. Industrial Board of Illinois*, 273 Ill. 528, L. R. A. 1916F 540, 113 N. E. 80.

24. *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 So. 693.

25. *Smith v. Industrial Acc. Commission of California*, 26 Cal. App. 560, 147 Pac. 600, in which the court said: "Touching the claim of petitioner that, whatever character his act may have had as being connected with the operation of an interstate train up to the moment that he had driven the intruders therefrom and had himself alighted on the ground,

his further act in attempting to drive the men away was one not connected with the first duty, and was of a local nature only, it appears that the act was a continuous one without a break or stop. The watchman caused the men who sought to trespass on the interstate train to leave it and then, in the words of the finding made by the Commissioner, he 'was following them to drive them off the company's property when he stumbled and his revolver fell from the holster and was discharged.' It would be to mark a very fine line of distinction to say that from the moment the watchman and the intruders stepped from the interstate train the acts of the former changed from being

employed at a point where a public street crossed the tracks of an interstate railroad and whose duties consisted in closing the gates upon the approach of trains so as to prevent access to the track by vehicles, was held to be engaged in interstate commerce as it appeared that the tracks were used indiscriminately in both interstate and intrastate commerce.<sup>26</sup> An engine hostler who was employed at night in watching, coaling, watering and keeping up steam in a switch engine in a railroad yard, which was used during the day in switching interstate and intrastate cars, was not, while so engaged, employed in interstate commerce for the reason that the engine was not used in any kind of commerce during the whole time that the employe was on duty.<sup>27</sup> A crossing flagman is engaged in interstate commerce while signalling interstate trains.<sup>28</sup>

**§ 520. Yard Clerks Engaged in Interstate Commerce, When.** Yard clerks in the employ of common carriers by railroad while examining and recording the numbers and initials of cars, inspecting and making a record of the seals on car doors, checking the cars with the conductors' lists or putting labels on the cars to guide switching crews are employed in interstate commerce if trains upon which they are so working have any cars containing interstate commerce.<sup>29</sup> In the case of *St. Louis, S. F. & T. R. Co. v. Seale*, cited in the notes, the

in aid of interstate commerce and his further motions in pursuit of these same intruders became colored with conditions of a purely local employment. The federal courts have not indulged such close distinctions in applying the statutes.'

26. *Southern Pac. Co. v. Industrial Acc. Commission of California*, 174 Cal. 8, 161 Pac. 1139.

27. *Hardy v. Atlanta & W. P. R. Co.*, — Ga. App. —, 93 S. E. 18.

28. *West v. Atlantic Coast Line R. R.*, — N. C. —, 93 S. E. 479.

29. *Pecos & N. T. R. Co. v. Rosenbloom*, 240 U. S. 439, 60 L. Ed. 730, 36 Sup. Ct. 390; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. 651, Ann. Cas. 1914C, 156, rev'g — Tex. Civ. App. —, 3 N. C. C. A. 800, 148 S. W. 1099, *Pittsburgh, C., C. & St. L. R. Co. v. Farmers' Trust & Savings Co.*, 183 Ind. 287, 108 N. E. 108.

decedent was a yard clerk, and, at the time of his injury and death, was on his way through a railroad yard to one of the tracks to meet an incoming freight train which had arrived from another state. He was going to the train to take the numbers of the cars and otherwise perform his duties in respect to them. While so engaged he was struck by a switch engine, which, it was claimed, was negligently operated by other employes. The Supreme Court of the United States held that the decedent was engaged in interstate commerce at the time of his death, Mr. Justice Lamar, dissenting. Discussing the legal effects of the facts mentioned, the court said: "In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

**§ 521. Servants of Railroad Companies Handling United States Mail in Connection with Interstate Trains.** The transportation of United States mail by common carriers by railroad stands upon the same footing as the

"Trains that came into the yards consisted of cars passing from one state to another, and, according to plaintiff's testimony, he was walking through the yard noting cars to be made up into trains for through traffic. On

that day, Sunday, no local freights were handled. This testimony warranted the jury in finding that plaintiff was engaged in interstate commerce." *Southern Ry. Co. v. Fisher*, — Ala. —, 74 So. 580.



transportation of freight, baggage or other commodities. The fact that the carriage is for the federal Government does not differentiate the service from that rendered for individuals. It is a part of the regular business of railroads from which they derive a substantial revenue. An assistant station agent, therefore, on his way from a depot to the mail car of an interstate train for the purpose of taking United States mail from the train to the station was engaged in interstate commerce within the federal act.<sup>30</sup> In another case, it appeared that a call boy in the service of a railroad company was killed while delivering United States mail from the defendant's depot to one of its interstate trains. It was contended on behalf of his beneficiaries that, inasmuch as the carriage in regard to which the employer was engaged, in so far as any service of deceased was concerned, at the time he received his injury, was the carriage of United States mail, it was not and could not be, in respect to such service, a common carrier engaged in interstate commerce within the meaning of the federal act and that, therefore, the state compensation act applied. But in rejecting this contention, the supreme court of California said:<sup>31</sup> "Basing their claim upon certain decisions to the effect that a railroad company in carrying United States mail is not, with respect to such service, acting as a 'common carrier,' with the corresponding rights and liabilities of that relation, but is, in that particular service, serving as an agency of government (see *Atchison, etc., Ry. Co. v. U. S.*, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236; *Bankers' Mutual Casualty Co. v. Minneapolis, etc., Ry. Co.*, 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397; *Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Boston Ins. Co. v. Chicago, etc., Co.*, 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796), it is urged by petitioner that the federal Employers' Liability Act can have no application here. It is urged by counsel that the act applies only to such

30. *Lynch v. Boston & M. R. R.*, 227 Mass. 123, 116 N. E. 401.

31. *Zenz v. Industrial Acc. Commission*, — Cal. —, 168 Pac. 364.

service as is being performed by the railroad company under such circumstances as make it a 'common carrier,' with all the resultant legal rights and obligations, with relation to the person for whom the service is performed. The language of the act is: 'That every common carrier by railroad while engaging in commerce between any of the several states or territories \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative,' etc. No one of the cases cited by learned counsel for petitioner arose under the federal Employers' Liability Act, and cannot be taken as authority upon its proper construction. The first case cited (*Atchison, etc., Ry. Co. v. U. S.*, *supra*) had to do solely with the question of the relation of the carrier of mail to the government, its rights and liabilities in regard thereto, and it was held that with relation to the government it was not 'acting as a common carrier, with corresponding rights and liabilities, but as an agency of the government under contract with the government. In the other cases the litigation involved the question of the liability of the carrier to senders and addressees of mail matter. It was held that the carrier of mail was not, in respect to senders and addressees of mail, 'a common carrier,' with corresponding rights and liabilities, but, with regard to them, was acting solely as a government agency. We think this distinction, so important when we are considering the question of the rights and obligations of the railroad carrier with relation to the government, and the senders and addressees of mail, is unimportant here. In enacting the federal Employers' Liability Act, Congress was endeavoring to cover the whole field of the relations between carriers by railroad engaged in interstate commerce and their employes, with respect to their obligations to the employes, and the remedies of the latter for any violation of those obligations. Whether in a particular case one primarily engaged in the business of a common carrier is carrying particular goods in that capacity rather than as a mere agent or under some other

kind of contract is of importance only as relates to his obligations and liabilities to those for whom he carries, a matter having no real pertinency to the subject matter of this legislation. To our minds, the expression 'common carrier by railroad' was used simply to designate the class of employer belonging to the act, and, as put by counsel for respondents, 'in the generic definitive sense' as including only common carriers 'by railroad' as distinguished from common carriers by other means of transportation. If the employer is primarily engaged in the business of transporting passengers and freight for hire by railroad as a common carrier, it comes within the act, as to its railroad of course, provided always that it is subject to the act only while engaged in interstate commerce, and only on account of injuries or death suffered by an employe while he is employed by such carrier in such commerce. That the Atchison, Topeka & Santa Fe Railroad Company was primarily a 'common carrier by railroad,' actually engaged in its business as such at the time of the accident, is not questioned. The remaining question is, then, whether in the matter of the transportation of its mail it was engaged in interstate commerce, entirely regardless of whether it transported such mail, so far as its relations with the government are concerned, as a common carrier or as an agency of the government. We think there can be no serious question, in view of the decisions, that the transportation of mail between different states and territories is interstate commerce."

§ 522. **Agents of Express Companies.** Agents of express companies riding on passenger trains are not employes of the railroad company within the meaning of the federal act where they are paid and employed by the express companies although they handle baggage of passengers on the train.<sup>32</sup> In another case it was decided that an express messenger employed and paid by

32. *Higgins v. Erie R. Co.*, 89 K. & T. R. Co. v. West, 38 Okla. N. J. L. 629, 99 Atl. 98; *Missouri*, 581, 134 Pac. 655.

an express company, while riding on a passenger train of a railroad company and looking after the express business of his employer was presumed to be a passenger and not a servant of the railroad company although he was killed while so employed through the negligence of the railroad company's employees.<sup>33</sup> It was held by the court that, in the absence of any evidence that he was employed by the railroad company, the evidence was sufficient to show that the negligence of the defendant caused his death.

**§ 523. Interstate Status of Express Messengers Employed Jointly by Railroad and Express Companies.**

But the federal act does include an express messenger employed jointly by an express company and a common carrier by rail if he is injured while working for the railroad company in interstate commerce. Thus, an express messenger in the employ of an express company on a train running between Washington and Montana who was also employed by the railroad company to operate the electric plant of the train in the express car, was within the domain of the federal act.<sup>34</sup> On the other hand, a station agent who was a joint employe of an express and a railroad company was not an employe of the railroad company within the meaning of the federal act while he was removing an interstate express shipment from a depot platform into the station.<sup>35</sup>

**§ 524. Pullman Employees.** Persons employed jointly by a sleeping car company and a railroad company are within the protection of the federal act. A Pullman porter was employed on a sleeping car which was owned jointly by the Pullman Company and a railroad company and the car was operated by them as an association under a contract. It was held that the administrator of his estate could recover under the nation-

33. *Missouri, K. & T. R. Co. of Texas v. Blalack*, 105 Tex. 296, 147 S. W. 559.

34. *Wesseler v. Great Northern*

R. Co., 90 Wash. 234, 155 Pac. 1063, 157 Pac. 461.

35. *Bogart v. New York Cent. & H. River R. Co.*, 171 N. Y. App. Div. 652, 157 N. Y. Supp. 420.



al statute.<sup>36</sup> On the other hand in another case the railroad company simply hauled cars of the Pullman Company under a contract and it was decided that a porter on the sleeping car belonging to the Pullman Company was not an employe of the railroad company within the meaning of the federal statute.<sup>37</sup>

**§ 525. Miscellaneous Employees.** A gardner who was employed by a common carrier by railroad of interstate commerce, in taking care of the depot premises and burning trash gathered in the yard, was not employed in interstate commerce.<sup>38</sup> In an action under the federal act, a petition alleged that the defendant railroad company was a common carrier engaged in interstate commerce; that as a part of its interstate transportation it owned and operated a telegraph line using it for the purpose of directing the operation of trains; that the plaintiff was employed by the company in repairing this line and was injured while doing so. The court held that the petition pleaded sufficient facts to show that the plaintiff was engaged in interstate commerce.<sup>39</sup> A watchman on a "dead" locomotive engine being transported in an interstate train was held to have been engaged in interstate commerce.<sup>40</sup> A laborer employed in carrying coal to heat the stoves in a car repair shop of a common carrier by railroad where other employes were engaged in repairing rolling stock used interchangeably in transporting intrastate and interstate commerce, was held to be within the protection of the federal act;<sup>41</sup> but on writ of error to the federal Supreme Court, this case was reversed in a memorandum opinion.<sup>42</sup>

36. *Oliver v. Northern Pac. Ry. Co.*, 196 Fed. 432.

37. *Martin v. New York, N. H. & H. R. Co.*, 241 Fed. 696; *Robinson v. Baltimore & O. R. Co.*, 40 App. Cas. (D. C.) 169, L. R. A. 1915D 510.

38. *Galveston, H. & S. A. Ry. Co. v. Chojnacky*, — Tex. Civ. App. —, 163 S. W. 1011.

39. *Deal v. Coal & Coke Ry. Co.*, 215 Fed. 285.

40. *Atlantic Coast Line R. Co. v. Jones*, 9 Ala. 499, 63 So. 693.

41. *Cousins v. Illinois Cent. R. Co.*, 126 Minn. 172, 6 N. C. C. A. 182, 148 N. W. 58.

42. *Illinois Cent. R. Co. v. Cousins*, 241 U. S. 641, 60 L. Ed. 1216, 36 Sup. Ct. 446 (mem. dec.).

A carpenter building forms on the right of way of an interstate railroad, into which concrete was to be poured for the purpose of forming the retaining walls for the roadbed was not engaged in interstate commerce because such work did not have a direct and substantial connection with interstate transportation.<sup>43</sup> A line-man engaged in wiping the insulators on a power line transmitting alternating current of high voltage from a main power house to the sub-station of an electric interstate railroad, was held not to be within the federal act for the reason that his connection with interstate commerce was too remote.<sup>44</sup>

43. *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342, 117 N. E. 438.

44. *Southern P. Co. v. Industrial Accident Commission*, — Cal. —, 171 Pac. 1071, *Wilbur*,

*J.*, and *Melbin, J.*, dissenting. This case was pending in the federal Supreme Court on writ of certiorari at the time of the publication of this work.

## CHAPTER XXVII

### NEGLIGENCE UNDER FEDERAL ACT.

- Sec. 526. The Statutory Provision.
- Sec. 527. Two Branches of Negligence Under First Section.
- Sec. 528. Negligence Criterion of Liability of Carrier under National Statute.
- Sec. 529. Negligence need not be Proven when Violation of Safety Appliance Act is Cause of Injury.
- Sec. 530. Negligence of Human Agencies Not Limited to Fellow Servants as Construed under Common Law.
- Sec. 531. Negligence of Common Carrier Need Not be Shown by Direct or Positive Proof.
- Sec. 532. Judicial Definition of Negligence.
- Sec. 533. Carrier not Required to Furnish Latest, Best and Safest Appliances for Interstate Employees.
- Sec. 534. Custom or Practice of Other Railroads not Conclusive in Determining Exercise of Ordinary Care.
- Sec. 535. Decisions of National Courts Control in Determining Negligence—Contrary Rulings.
- Sec. 536. Conflicting Rulings Finally Eliminated by Controlling Decisions of National Supreme Court.
- Sec. 537. Negligent Act Must have been Committed while Employee was Acting within Scope of Employment.
- Sec. 538. Negligence Must be Proximate Cause of Injury.
- Sec. 539. Meaning of the Phrase "In Whole or in Part".
- Sec. 540. State Statutes Creating Presumption of Negligence from Injury Inapplicable to Interstate Employees.
- Sec. 541. Mississippi "Prima Facie" Statute Held Applicable to Actions under Federal Act.
- Sec. 542. Sufficiency of Evidence of Negligence to Submit Cause to Jury not Governed by Decisions of State Courts.
- Sec. 543. Effect of State Law Prohibiting Employment of Minors in Determining Negligence.
- Sec. 544. Applicability of Rule of Res Ipsa Loquitur to Actions under Federal Act—Conflicting Rulings.
- Sec. 545. Recovery Cannot be Defeated When Defendant's Negligence is Part of Causation.
- Sec. 546. Casualties Due to Sole Negligence of Employee, no Recovery under Federal Act.
- Sec. 547. Foregoing Principle Further Illustrated and Applied.
- Sec. 548. Cases Under Federal Act in Which the Facts were Held to Show Actionable Negligence.
- Sec. 549. Cases Under Federal Act in Which the Facts were Held not to Show Actionable Negligence.

Sec. 550. Statute Covers Acts of Intrastate Employees and Defects in Instrumentalities Used Solely in Intrastate Commerce.

Sec. 551. Intrastate Employees Injured by Negligence of Interstate Employees or Instrumentalities of Interstate Commerce have no Remedy under Federal Act.

Sec. 552. Willful Wrongs not Within Terms of the Act.

**§ 526. The Statutory Provision.** The first section of the Federal Employers' Liability Act provides that every common carrier by rail while engaging in interstate commerce and while the servant injured or killed is employed in such commerce is liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipments."

**§ 527. Two Branches of Negligence Under First Section.** The clause relating to negligence in the first section of the federal act has two branches; one governing the negligence of any of the officers, agents or employes of the carrier, which abolishes the common law fellow-servant doctrine; and the other relating to defects and insufficiencies due to negligence in the railroad's rolling stock, machinery, track, road-bed, works, boats, wharves or other equipment. These two clauses, it has been held, cover any and all negligent acts of which the carrier could have been guilty under the common law.<sup>1</sup> "The language", said the court in the case cited, "used is, 'any officers, agents, or employes,' and this is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employes therein. It is true that in the second class the language used is 'its negligence.' But its negligence must be negligence also of those officers, agents, and employes to whom it has intrusted the duty of looking after the condition of its

1. *De Altey v. Chesapeake & O. Ry. Co.*, 201 Fed. 591.



cars, etc. It can only act through officers, agents, and employes, and the failure to look after such condition properly is necessarily negligence on the part of officers, agents, and employes to whom it has intrusted the duty of looking thereafter. The two classes seem, therefore, to overlap, but I do not think that one is justified in limiting the language of the first class to prevent overlapping, which would be done by limiting the first class to the negligence of servants for which the common carrier is not liable at common law, leaving the second class to cover the negligence of servants for whom it is in such cases as it covers. By so doing there would be eliminated from the act liability thereunder for certain negligence on the part of servants for whom the carrier is liable at common law, to wit, negligence on the part of servants who are not fellow servants, but which does not relate to its 'cars, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment,' as in the case here, where, according to the allegation of the petition, there was negligence on the part of such servants of defendant to whom it had intrusted its non-delegable duty of adopting and promulgating the proper rules as to operation of its trains. It seems to me that it was the intent and purpose of the act to cover every negligence for which a common carrier engaged in interstate commerce might be liable to its employes in such commerce. It is settled that it supersedes all other common-law and statutory liability on the part of such common carriers to such employes. If, then, the act does not cover every negligence for which such common carrier may be liable to such employes, there are cases of negligence, and this, as to the negligence in not adopting and promulgating the rule in question, is one of them, in which there is no liability at all. But this cannot have been the intention of Congress. It is difficult, however, to explain why it separated the cases of liability into two classes, where the first class is broad enough in terms to include the second class, and, indeed, to cover every case of negligence for which the common

carrier might be made liable, and no explanation thereof occurs to me. But the inability to find such explanation does not justify one in limiting the first class to fellow servants so as to get two distinct classes, which do not overlap each other, thereby eliminating from the act certain cases of negligence for which there is liability at common law. It is sufficient to say that the act in express terms covers the negligence of any of the officers, agents, or employes of the common carrier, and the failure to adopt and promulgate a proper rule for the operation of its train is negligence on the part of its officers, agents, and employes to whom it has intrusted the performance of such duty."

§ 528. **Negligence Criterion of Liability of Carrier under National Statute.** Except that it abolishes the common law rule of non-liability for injuries to employes due to the negligence of fellow servants, the first section of the Federal Employers' Liability Act which defines when a carrier is liable, adopts the common law rule of negligence as to the two branches of liability mentioned therein.<sup>2</sup> Negligence is the basis of all liabil-

2. **United States.** *Nelson v. Southern Ry. Co.*, 246 U. S. 253, 62 L. Ed.—, 38 Sup. Ct. 233; *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Pennsylvania R. Co. v. Glas*, 152 C. C. A. 244, 239 Fed. 256; *Virginian R. Co. v. Linkous*, 148 C. C. A. 543, 235 Fed. 49.

**Arkansas.** *St. Louis, I. M. & S. R. Co., v. Ingram*, 124 Ark. 298, 187 S. W. 452.

**Florida.** *Louisville & N. R. Co. v. Rhoda*,—Fla.—, 74 So. 19.

**Georgia.** *Ivey v. Louisville & N. R. Co.*, 18 Ga. App. 434, 89 S. E. 629.

**Indiana.** *Chicago & E. R. Co. v. Webb*,—Ind. App.—, 113 N. E. 748.

**Kansas.** *Spinden v. Atchison, T. & S. F. R. Co.*, 95 Kan. 474, 148 Pac. 747.

**Kentucky.** *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786.

**Michigan.** *Gaines v. Grand Trunk R. Co. of Canada*, 193 Mich. 398, 159 N. W. 542.

**New Hampshire.** *Wilson v. Grand Trunk Ry. Co.*,—N. H.—, 97 Atl. 981.

**New York.** *Corico v. Smith*, 97 N. Y. Misc. 447, 161 N. Y. Supp. 293.

**North Carolina.** *Hinson v. Atlanta & C. Air Line R. Co.*, 172 N.

ity under the act, and there can be no recovery under the statute in the absence of negligence on the part of the railroad company or some of its employes.<sup>3</sup> Under

C. 646, 90 S. E. 772; *Ren v. Seaboard Air Line R. Co.*, 170 N. C. 128, 86 S. E. 964.

**North Dakota.** *Manson v. Great Northern R. Co.*, 31 N. D. 643, 155 N. W. 32.

**Oklahoma.** *Palmer v. Wichita Falls & N. W. Ry. Co.*, — Okla. —, 159 Pac. 1115.

**South Carolina.** *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639.

**Texas.** *Gulf, C. & S. F. Ry. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

**Virginia.** *Going's Adm'x v. Norfolk & W. R. Co.*, 119 Va. 543, 89 S. E. 914.

**Washington.** *Martin v. Northern P. Ry. Co.*, 87 Wash. 91, 151 Pac. 113.

**West Virginia.** *Culp v. Virginia R. Co.*, 77 W. Va. 125, 87 S. E. 187; *Easter v. Virginian R. Co.*, 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

"Nowhere in the act is any definition of negligence to be found. Therefore the term must be taken to mean such act of commission or omission as would at common law have been sufficient to entitle the case to be submitted to a jury." *Western Maryland R. Co. v. Sanner*, 130 Md. 581, 101 Atl. 587.

Negligence is an affirmative fact which the plaintiff must establish under the Federal Liability Act, according to the principles of the common law as applied in the federal courts. *New Orleans & N. E. R. Co. v. Harris*, 246 U. S. —, 62 L. Ed., —, 38 Sup. Ct. 535, decided June 3, 1918.

3. **United States.** *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Illinois Cent. R. Co. v. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249; *Chicago R. I. & P. R. Co. v. Wright*, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; *Reese v. Philadelphia & R. R. Co.*, 239 U. S. 463, 60 L. Ed. 384, 36 Sup. Ct. 134, 10 N. C. C. A. 926; *Texas & P. R. Co. v. Murphy*, 238 U. S. 320, 59 L. Ed. 1329, 35 Sup. Ct. 779; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 59 L. Ed. 671, 35 Sup. Ct. 306; *Kansas City, C. & S. R. Co. v. Shoemaker*, 157 C. C. A. 413, 245 Fed. 117; *Cincinnati, N. O. & T. P. R. Co. v. Hall*, 155 C. C. A. 606, 243 Fed. 76; *Pennsylvania R. Co. v. Glas*, 152 C. C. A. 244, 239 Fed. 256; *Smith v. Pennsylvania R. Co.*, 151 C. C. A. 277, 239 Fed. 103, 15 N. C. C. A. 371; *Philadelphia & R. R. Co. v. Marland*, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; *Hughes v. Delaware, L. & W. R. Co.*, 233 Fed. 118; *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 88.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Steel*, 129 Ark. 520, 15 N. C. C. A. 49, 197 S. W. 288; *Lusk v. Osborn*, 127 Ark. 170, 191 S. W. 944; *St. Louis I. M. & S. R. Co. v. Howard*, 124 Ark. 588, 188 S. W. 14; *St. Louis, I. M. & S. R. Co. v. Stewart*, 124 Ark. 437, 187 S. W. 920; *St. Louis, I. M. & S. R. Co.*

the act, the company is not a guarantor of the safety of

*v. Ingram*, 124 Ark. 298, 187 S. W. 452.

**Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19.

**Georgia.** *Southern Ry. Co. v. Blackwell*, — Ga. App. —, 93 S. E. 321; *Louisville & N. R. Co. v. Coatney*, — Ga. App. —, 93 S. E. 228; *Rush v. Southern Ry. Co.*, — Ga. App. —, 91 S. E. 898; *Landrum v. Western & A. R. Co.*, 146 Ga. 88, 90 S. E. 710; *Central of Georgia R. Co. v. De Loach*, 18 Ga. App. 362, 89 S. E. 433; *Alabama Great Southern R. Co. v. Tidwell*, 145 Ga. 190, 88 S. E. 939; *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

**Illinois.** *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, Ann. Cas. 1916B 481, 107 N. E. 595.

**Indiana.** *Chicago & E. R. Co. v. Mitchell*, — Ind. App. —, 110 N. E. 78; *Southern R. Co. v. Howerton*, 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369.

**Kansas.** *Westling v. Atchison, T. & S. F. Ry. Co.*, — Kan. —, 165 Pac. 669; *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, L. R. A. 1917E 741, 162 Pac. 1153; *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759; *Land v. St. Louis & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612; *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 849.

**Kentucky.** *Louisville & N. R. Co. v. Netherton*, 175 Ky. 159, 193 S. W. 1035; *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786; *Sutton's Adm'r v. Louisville & N. R. Co.*, 168 Ky. 81, 181 S. W. 938; *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831; *Louisville & N. R. Co. v. Henry*, 167 Ky. 151, 180 S. W. 74;

*Davis v. Chesapeake & O. R. Co.*, 166 Ky. 490, 179 S. W. 422; *Cincinnati N. O. & T. P. R. Co. v. Goldston*, 163 Ky. 42, 173 S. W. 161; *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246; *Long v. Southern R. in Kentucky*, 155 Ky. 286, 159 S. W. 779.

**Louisiana.** *Anderson v. Texas & P. R. Co.*, 139 La. 1104, 72 So. 751.

**Maine.** *Norton v. Maine Cent. R. Co.*, — Me. —, 100 Atl. 598.

**Maryland.** *Western Maryland R. Co. v. Sanner*, 130 Md. 581, 101 Atl. 587; *Baltimore & O. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225.

**Massachusetts.** *Herlihy v. New York, N. H. & H. R. Co.*, 227 Mass. 168, 116 N. E. 546.

**Michigan.** *Gaines v. Grand Trunk R. Co. of Canada*, 193 Mich. 398, 159 N. W. 542; *Miller v. Michigan Cent. R. Co.*, 185 Mich. 432, 152 N. W. 235; *Walsh v. Lake Shore & M. S. R. Co.*, 185 Mich. 177, 151 N. W. 754; *Richardson v. Detroit & M. R. Co.*, 182 Mich. 206, 148 N. W. 397; *Gaines v. Detroit, G. H. & M. R. Co.*, 181 Mich. 376, 148 N. W. 397; *Hollingshead v. Detroit, G. H. & M. R. Co.*, 181 Mich. 547, 148 N. W. 171.

**Minnesota.** *Beecroft v. Great Northern R. Co.*, 134 Minn. 86, 158 N. W. 800; *Maijala v. Great Northern R. Co.*, 133 Minn. 301, 158 N. W. 430; *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005; *La Mere v. Railway Transfer Co.*, 125 Minn. 159, Ann. Cas. 1915C 607, 145 N. W. 1068.

**Mississippi.** *Hooks v. New Orleans & N. E. R. Co.*, 111 Miss. 743, 72 So. 147.

**Missouri.** *Yoakum v. Lusk*, — Mo. App. —, 193 S. W. 635; *Win-*



the place of work or of the machinery and appliances

*slow v. Missouri, K. & T. Ry. Co.* (Mo. App.), 192 S. W. 121; *Holtz-claw v. Chicago, B. & Q. R. Co.*, — Mo. App. —, 190 S. W. 91; *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Blankenbaker v. St. Louis & S. F. R. Co.* (Mo.), 187 S. W. 840; *Haines v. Chicago, R. I. & P. Ry.* 193 Mo. App. 453, 185 S. W. 1187; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 172 S. W. 340; *Pan-key v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.

**New Hampshire.** *Castonia v. Maine Cent. R. Co.*, — N. H. —, 100 Atl. 601; *Topore v. Boston & M. R. R.* — N. H. —, 100 Atl. 153; *Wilson v. Grand Trunk Ry. Co.*, — N. H. —, 97 Atl. 981; *Caverhill v. Boston & M. R. R.*, 77 N. H. 330, 91 Atl. 917.

**New Jersey.** *Armbrecht v. Delaware, L. & W. R. Co.*, — N. J. L. —, 101 Atl. 203; *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764.

**New York.** *White v. Lehigh Valley R. Co.*, 220 N. Y. 131, 115 N. E. 439; *Swartwood v. Lehigh Valley R. Co.*, 169 N. Y. App. Div. 759, 155 N. Y. Supp. 778; *Gee v. Lehigh Valley R. Co.*, 163 N. Y. App. Div. 274, 148 N. Y. Supp. 882; *Collins v. Pennsylvania R. Co.*, 163 N. Y. App. Div. 452, 148 N. Y. Supp. 777.

**Oklahoma.** *Palmer v. Wichita Falls & N. W. Ry. Co.*, — Okla. —, 159 Pac. 1115; *Chicago, R. I. & P. R. Co. v. Felder*, — Okla. —, 155 Pac. 529.

**Oregon.** *Emerson v. Portland, E. & E. R. Co.*, 85 Ore. 229, 166 Pac. 946; *Gekas v. Oregon-Washington R. & Nav. Co.*, 75 Ore. 243, 8 N. C. C. A. 386, 146 Pac. 970.

**Pennsylvania.** *Haas v. Erie R. Co.*, 254 Pa. 235, 98 Atl. 867; *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461; *Hartman v. Western Maryland R. Co.*, 246 Pa. 460, 92 Atl. 698.

**South Carolina.** *Mulligan v. Atlantic Coast Line R. Co.*, 104 S. C. 173, 88 S. E. 445; *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639.

**Texas.** *Panhandle & S. F. Ry. Co. v. Fitts*, — Tex. Civ. App. —, 188 S. W. 528; *Houston, E. & W. T. Ry. Co. v. Samford*, — Tex. Civ. App. —, 181 S. W. 857.

**Vermont.** *Sanderson v. Boston & M. R. R.*, — Vt. —, 101 Atl. 40; *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925.

**Virginia.** *Norfolk & W. R. Co. v. Tucker's Adm'x*, 120 Va. 540, 91 S. E. 614; *Goings's Adm'x v. Norfolk & W. R. Co.*, 119 Va. 543, 89 S. E. 914; *Chesapeake Western Ry. v. Shiffett's Adm'x*, 118 Va. 63, 86 S. E. 860.

**Washington.** *Toler v. Northern Pac. R. Co.*, 94 Wash. 360, 162 Pac. 538; *Papoutsikis v. Spokane, P. & S. R. Co.*, 89 Wash. 1, 153 Pac. 1053; *Snyder v. Great Northern R. Co.*, 88 Wash. 49, 152 Pac. 703; *Hobbs v. Great Northern R. Co.*, 80 Wash. 678, L. R. A. 1915D 503, 142 Pac. 20.

**West Virginia.** *Hull v. Virginia R. Co.*, 78 W. Va. 25, 88 S. E. 1060; *Culp v. Virginia R. Co.*, 77 W. Va. 125, 87 S. E. 187.

**Wisconsin.** *Molzoff v. Chicago, M. & St. P. R. Co.*, 162 Wis. 451, 11 N. C. C. A. 273, 156 N. W. 467.

There is no presumption of negligence against the defendant in an action under the federal act.

furnished its employes.<sup>4</sup> The extent of its duty to its employes, is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances furnished may be safe for the workmen.<sup>5</sup> To convict a defendant

Louisville & N. R. Co. v. Coatney, *supra*.

An injury, coming within the purview of the federal statute, must result in whole or in part from negligence. Chicago & E. R. Co. v. Mitchell, *supra*.

In order to determine whether there can be a recovery under the federal act, it is first necessary to ascertain whether there has been actionable negligence on the part of the carrier; for not all cases of accident and injury are included within the provisions of the act, but only those in which negligence is the cause from which the injury results. Western Maryland R. Co. v. Saner, *supra*.

"When this statute is invoked as a basis of liability it must be shown that the employer is a common carrier by railroad engaged in interstate commerce and that the injury to the employe came while he was employed by the carrier in such commerce; and of course negligence must be proved. See Roberts' Injuries to Interstate Employes, sec. 26, et seq and cases cited." Hurley v. Illinois Cent. R. Co., *supra*.

It is not enough to show that the defendant may have been guilty of negligence. The evidence must show that it was actually guilty. Hull v. Virginian Ry. Co., *supra*.

An employe while walking along a railroad track received an injury when a piece of a cross

tie slivered off under his weight and his foot slipped between the ties where the ballast was five or six inches below the top of the tie. It was held that the company was not negligent for the reason that neither the condition of the tie, nor the failure to ballast to the top of the tie, was a defect of such a character as to impair safety in operation. Nelson v. Southern Ry. Co., 246 U. S. 253, 62 L. Ed. —, 38 Sup. Ct. 233.

Proof that the decedent, an engineer, was killed in a collision between the locomotive on which he was riding and the caboose of a standing train was not sufficient to show negligence on the part of the defendant. Lynch v. Delaware & H. Co., — App. Div. —, 170 N. Y. Supp. 412.

4. Kansas City Southern R. Co. v. Livesay, 118 Ark. 304, 177 S. E. 875; Miller v. Michigan Cent. R. Co., 185 Mich. 432, 152 N. W. 235; Hawkins v. St. Louis & S. F. R. Co., 189 Mo. App. 201, 174 S. W. 129; Toler v. Northern Pac. R. Co., 94 Wash. 360, 162 Pac. 538.

5. United States. Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834; Ann. Cas. 1915B 475, rev'g 162 N. C. 424, 78 S. E. 494; Charnock v. Texas & P. R. Co., 194 U. S. 432, 48 L. Ed. 1057, 24 Sup. Ct. 671; Philadelphia & R. R. Co. v. Mar-

railroad company of negligence under the section, as to defects, plaintiff must prove the existence of the defect complained of; that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant; and that it was the proximate cause of the injury.<sup>6</sup> In the Horton case, cited *supra*, which is the leading case construing the first section of the federal Act, defining when a carrier by railroad is liable, the plaintiff brought suit under the federal act in a state court in North Carolina. The statute of North Carolina provided that "any servant or employe of any railroad company operating in this state who shall suffer injury to his person, or the personal representative of any such servant or employe who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness or incompetence of any other servant, employe or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company." Notwithstanding the fact that the plaintiff was suing

land, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; *Coal & Coke Co. v. Deal*, 145 C. C. A. 490, 231 Fed. 604, citing *Roberts*, *Injuries to Interstate Employees*;

**Arkansas.** *Kansas City Southern R. Co. v. Livesay*, 118 Ark. 304, 177 S. W. 875.

**Oklahoma.** *St. Smith & W. R. Co. v. Holcombe*, — Okla. —, 158 Pac. 633.

**South Carolina.** *Mulligan v. Atlantic Coast Line R. Co.*, 104 S. C. 173, 88 S. E. 445; *Thornton v. Seaboard Air Line Ry.*, 98 S. C. 348, 82 S. E. 433.

**Washington.** *Toler v. Northern Pac. R. Co.*, 94 Wash. 360, 162 Pac. 538.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060.

6. **United States.** *Seaboard Air Line Ry. v. Moore*, 228 U. S. 433, 57 L. Ed. 907, 33 Sup. Ct. 580, 3 N. C. C. A. 812.

**Georgia.** *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

**Idaho.** *Neil v. Idaho & W. N. R. R.*, 22 Idaho 74, 125 Pac. 331.

**Iowa.** *McCullough v. Chicago R. I. & P. R. Co.*, 160 Iowa 524, 47 L. R. A. (N. S.) 23, 142 N. W. 67.

**Kentucky.** *Helm v. Cincinnati, N. O. & T. P. R. Co.*, 156 Ky. 240, 160 S. W. 945; *Long v. Southern R. Co.*, in *Kentucky*, 155 Ky. 286, 159 S. W. 779; *South Covington & C. St. R. Co. v. Finan's Adm'x.*, 153 Ky. 340, 155 S. W. 742.

**Minnesota.** *Owens v. Chicago, G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011.

solely under the national statute, the trial court instructed the jury on the theory that this statute governed in determining negligence under the federal act. Upon the issue of defendant's negligence, the charge to the jury was in part as follows: "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work, and to furnish him with reasonably safe appliances with which to do his work." Another instruction given was: "If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that guage, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue 'Yes.' " Condemning these instructions as being improper under the federal act, Mr. Justice Pitney, for the court, said: "And in various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place of work and of the appliances for the work. . . . In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employes' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases, 233 U. S. 1, 55. . . . It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work;



the extent of its duty to its employes is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be preformed and the tools and appliances of the work may be safe for the workman. *Hough v. Railroad Co.*, 100 U. S. 213, 217; *Washington & Georgetown Railroad Co. v. McDade*, 135 U. S. 554, 570; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 67. To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common law rule, certainly the Act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was conclusive evidence of defendant's negligence. In this there was error."

**§ 529. Negligence need not be Proven when Violation of Safety Appliance Act is Cause of Injury.** In all actions under the Federal Employers' Liability Act, where the cause of injury or death is shown to have been due to any violation of the several sections of the Federal Safety Appliance Act, the plaintiff is not required to show negligence, for, as now construed by the courts, the Safety Appliance Act imposes an absolute duty upon the carrier to comply with the terms thereof in the equipment of its cars, and if any failure to comply with the law is the proximate cause of a death or injury, the carrier is absolutely and unconditionally liable without regard to the question whether the defect was or was not due to negligence, or could have been dis-

covered by reasonable diligence.<sup>7</sup> In other words, the carrier is liable if any violation of the Safety Appliance

**7. United States.** *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083; *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Great Northern R. Co. v. Otos*, 239 U. S. 349, 60 L. Ed. 322, 36 Sup. Ct. 124; *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, 60 L. Ed. 317, 36 Sup. Ct. 121, 10 N. C. C. A. 778; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; *Chicago R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826; *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 55 L. Ed. 590, 31 Sup. Ct. 617; *Pennsylvania Co. v. United States*, 241 Fed. 824; *Overstreet v. Norfolk & W. R. Co.*, 151 C. C. A. 501, 238 Fed. 565; *St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman*, 150 C. C. A. 203, 237 Fed. 1; *Clark v. Erie R. Co.*, 230 Fed. 478.

**Florida.** *Atlantic Coast Line R. Co. v. Whitney*, 65 Fla. 72, 3 N. C. C. A. 812, 61 So. 179.

**Illinois.** *Wagner v. Chicago, R. I. & P. R. Co.*, 277 Ill. 114, 115 N. E. 201.

**Iowa.** *Stearns v. Chicago, R. I. & P. R. Co.*, 166 Iowa, 566, 148 N. W. 128.

**Kentucky.** *Nashville, C. & St. L. Ry. v. Henry*, 158 Ky. 88, 164 S. W. 310.

**Louisiana.** *Lemee v. Texas & P. R. Co.*, 141 La. 769, 75 So. 676.

**Minnesota.** *Davis v. Minneapolis & St. L. R. Co.*, 134 Minn. 369, 159 N. W. 802; *Cramer v. Chicago, M. & St. P. R. Co.*, 134 Minn. 61, 158 N. W. 796; *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005; *McNaney v. Chicago, R. I. & P. R. Co.*, 132 Minn. 391, 157 N. W. 650; *Coleman v. Illinois Cent. R. Co.*, 132 Minn. 22, 155 N. W. 763; *Willett v. Illinois Cent. R. Co.*, 122 Minn. 513, 4 N. C. C. A. 479, 142 N. W. 883.

**Missouri.** *Christy v. Wabash R. Co.*, 195 Mo. App. 232, 191 S. W. 241; *Moore v. St. Joseph & G. I. R. Co.*, 268 Mo. 31, 186 S. W. 1035; *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787.

**Montana.** *Armitage v. Chicago, M. & St. P. Ry. Co.*, — Mont. —, 166 Pac. 301.

**New Jersey.** *Parker v. Atlantic City R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

**Pennsylvania.** *Whalley v. Philadelphia & R. R. Co.*, 248 Pa. 298, 93 Atl. 1016.

**South Carolina.** *Steeley v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639.

**South Dakota.** *Fletcher v. South Dakota C. R. Co.*, 36 S. D. 401, 155 N. W. 3.

**Virginia.** *Virginia R. Co. v. Andrews' Adm'x*, 118 Va. 482, 87 S. E. 577.

**Washington.** *Aldread v. Northern Pac. R. Co.*, 93 Wash. 209, 160 Pac. 429; *Bjornsen v. Northern Pac. R. Co.*, 84 Wash. 220, 146 Pac. 575.

**Wisconsin.** *Calhoun v. Great Northern R. Co.*, 162 Wis. 264, 156 N. W. 198.

Act causes an injury even though the defect could have been prevented by any degree of negligence. The statute does away with the common law rule making liability depend upon negligence, and makes the carrier absolutely liable for any injury resulting in the use of a car not equipped as provided by that act, or by the orders of the Interstate Commerce Commission made pursuant to the authority therein delegated to that body.<sup>8</sup> "It is argued", said Mr. Justice Pitney,<sup>9</sup> "that in actions based upon the Employers' Liability Act the defendant can not be held liable without evidence of negligence, *Seaboard Air Line v. Horton*, 233 U. S. 492, 501, being cited. But in that case, as the opinion shows (P. 507), there was no question of a violation of any provision of the Safety Appliance Act; and in what was said (P. 501) respecting the necessity of showing negligence, reference was had to causes of action independent of that Act. The Employers' Liability Act, as its section 4 very clearly shows, recognizes that rights of action may arise out of the violation of the Safety Appliance Act. As was stated in *Tex. & Pac. Ry. v. Rigsby*, *ante*, pp. 33, 39, 'A disregard of the command of the statute (Safety Appliance Act) is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.'

"The act contains an absolute command. It is not satisfied by the use of reasonable care to equip cars as it directs. The equipment must be in place and in an operative condition if the car is used in interstate commerce." *Moore v. St. Joseph & G. I. R. Co.*, 268 Mo. 31, 186 S. W. 1035.

8. *Chicago, R. I. & P. R. Co. v. Brown*, 229 U. S. 317, 57 L. Ed. 1204, 33 Sup. Ct. 840, 3 N. C. C. A. 826, *aff'g* 107 C. C. A. 300, 185 Fed. 80; *Chicago, B. Q. R. Co. v. United States*, 220 U.

S. 559, 55 L. Ed. 582, 31 Sup. Ct. 612; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616; *Atlantic Coast Line R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175; *United States v. Atchison T. & S. F. R. Co.*, 90 C. C. A. 327 163 Fed. 517; *Brinkmeier v. Missouri Pac. R. Co.*, 81 Kan. 101, 105 Pac. 221; *s. c.*, 224 U. S. 268, 56 L. Ed. 758, 32 Sup. Ct. 412.

9. *San Antonio & A. P. R. Co. v. Wagner*, 241 U. S. 476, 60 L. Ed. 1110, 36 Sup. Ct. 626.

If this Act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U. S. 43, and cases there cited. But the two statutes are *in pari materia*, and where the Employers' Liability Act refers to 'any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances, etc., it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence' what is sometimes called negligence per se."

§ 530. **Negligence of Human Agencies Not Limited to Fellow Servants as Construed under Common Law.** Under the first section of the federal act a carrier by railroad is liable for the negligence of any of its officers or employes and the statute does not confine the negligent acts of employes for which it is liable, to such servants as under the common law were construed to be fellow servants of the injured employe.<sup>10</sup> In the case of *DeAtley v. Chesapeake & O. Ry. Co.*, cited in the notes, a brakeman on a train carrying interstate shipments, was ordered to leave the train at a certain signal tower to get the train orders for the movement of the train and while returning with the orders he attempted in the usual and customary way to get on the train while it was moving, but missed his footing, fell and was injured. In his petition under the federal act he alleged, among other things, that the defendant was negligent in failing to adopt rules requiring all trains to be stopped so that brakemen would not be compelled to get on them while in motion. It was contended by the railroad company that this failure to adopt such a rule was not such a negligent act as was covered by the Employers' Liability Act for the reason that it was not the negligent act of a fellow servant; but the court held that the words in the statute "officers, agents and employes" were not limited to fellow servants as construed under the common law doctrines, but included any and all agents or officers of

10. *De Atley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591.



the company whose duty it was to adopt and promulgate rules governing the operation of trains. The court said: "It (defendant) can only act through officers, agents, and employes, and the failure to look after such condition properly is necessarily negligence on the part of officers, agents, and employes to whom it has intrusted the duty of looking thereafter. The two classes seem, therefore, to overlap, but I do not think that one is justified in limiting the language of the first class to prevent overlapping, which would be done by limiting the first class to the negligence of servants for which the common carrier is not liable at common law, leaving the second class to cover the negligence of servants for whom it is in such cases as it covers. . . . It seems to me that it was the intent and purpose of the act to cover every negligence for which a common carrier engaged interstate commerce might be liable to its employes in such commerce."

**§ 531. Negligence of Common Carrier Need Not be Shown by Direct or Positive Proof.** Direct or positive proof is not required to show that a negligent act or defect was the cause of an injury to, or death of, an employe engaged in interstate commerce.<sup>11</sup> The manner and circumstances of the occurrence, and all the accompanying surroundings, as proven, may be examined in order to ascertain and determine whether or not an inference that a negligent defect caused the death, was a reasonable one.<sup>12</sup> If the facts and circumstances are as consistent with the defendant's theory as with the plaintiff's theory no case is made for the jury; for, when the cause of an accident is left to conjecture, or may as

11. *Louisville & N. R. Co. v. Allen's Adm'r*, 174 Ky. 736, 192 S. W. 863; *Swartwood v. Lehigh Valley R. Co.*, 169 N. Y. App. Div. 759, 155 N. Y. Supp. 778; *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639; *Mulligan*

*v. Atlantic Coast Line R. Co.*, 104 S. C. 173, 88 S. E. 445.

12. *Carolina, C. & O. R. Co. v. Stroup*, 152 C. C. A. 125, 239 Fed. 75; *Strother v. Chicago, B. & Q. R. Co. (Mo.)*, 188 S. W. 1102.

reasonably be attributed to a condition for which no liability attaches, the plaintiff is not entitled to recover.<sup>13</sup> But if the plaintiff shows facts and circumstances from which negligence of the defendant, and the causation of the accident by negligence, may be reasonably and legitimately inferred, the cause should be submitted to the jury.<sup>14</sup>

§ 532. **Judicial Definition of Negligence.** The term "negligence" has been defined by the national Supreme Court to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.<sup>15</sup> The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the situation. Negligence has always re-

13. **United States.** *Smith v. Pennsylvania R. Co.*, 151 C. C. A. 277, 239 Fed. 103, 15 N. C. C. A. 371, **Georgia.** *Landrum v. Western & A. R. Co.*, 146 Ga. 88, 90 S. E. 710; *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

**Kentucky.** *Louisville & N. R. Co. v. Holloway's Adm'r*, 163 Ky. 125, 173 S. W. 343; *Cincinnati, N. O & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246.

**Maryland.** *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

**Michigan.** *Miller v. Michigan Cent. R. Co.*, 185 Mich. 432, 152 N. W. 235.

**Minnesota.** *Thompson v. Minneapolis & St. L. R. Co.*, 132 Minn. 203, 158 N. W. 42.

**North Dakota.** *Manson v. Great Northern R. Co.*, 51 N. D. 645, 155 N. W. 32.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060, 1060.

14. **United States.** *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658,

45 L. Ed. 361, 21 Sup. Ct. 275.

**Alabama.** *Western Ry. of Alabama v. Mays* 197 Ala. 367, 72 So. 641.

**New York.** *White v. Lehigh Valley R. Co.*, 220 N. Y. 131, 115 N. E. 439.

**South Carolina.** *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639.

**Washington.** *Donaldson v. Great Northern R. Co.*, 89 Wash. 161, 154 Pac. 133.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E.

"Plaintiff must prove that the death of his intestate came from some act for the result of which defendant is liable. It is not for the defendant to show that it came from some act for which it is not responsible. The proof need not be direct or positive. It must leave the result more than conjectural." *Hurley v. Illinois Cent. R. Co.*, 133 Minn. 101, 157 N. W. 1005.

15. *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

lation to the circumstances in which one is placed, and what an ordinarily prudent man would do or omit in such circumstances.<sup>16</sup>

**§ 533. Carrier not Required to Furnish Latest, Best and Safest Appliances for Interstate Employees.** Under the rule adopted by the United States Supreme Court, the carrier's duty towards its interstate employees is to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for their use. The employer is not required to furnish the latest, best and safest appliances or to abandon standard appliances upon the discovery of later improvements if those in use are reasonably safe and suitable.<sup>17</sup>

**§ 534. Custom or Practice of Other Railroad not Conclusive in Determining Exercise of Ordinary Care.** The standard of duty under the Federal Act upon all common carriers is ordinary care, that is, the care that a person of ordinary prudence would use under the same circumstances.<sup>18</sup> The custom or practice of other carriers may be admissible as evidence to determine whether ordinary care was exercised in a particular case; but evidence of that character is not conclusive, for the ultimate and controlling test always is, not what has been the practice of others in like situations, but did the defendant in the case under investigation exercise such care as a reasonably prudent person would ordinarily have exercised in such a situation? The law does not permit what ought to have been done to be determined

16. *Charnock v. Texas & P. R. Co.*, 194 U. S. 432, 48 L. Ed. 1057, 24 Sup. Ct. 671.

17. *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. 275; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 34 L. Ed. 235, 10 Sup. Ct. 1044; *Coal & Coke R.*

*Co. v. Deal* 145 C. C. A. 490, 231 Fed. 604; *Woodruff v. Yazoo & M. V. R. Co.*, 137 C. C. A. 567, 222 Fed. 29; *Woodruff v. Yazoo & M. V. R. Co.*, 127 C. C. A. 411, 210 Fed. 849; *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55.

18. *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 47 L. Ed. 905, 23 Sup. Ct. 622.

in the particular case by the practice of others; for the degree of care exercised by them may not be due, reasonable or proper, and, therefore, not ordinary care within the meaning of the law.<sup>19</sup> The law does not permit reason and common sense to lose their sway because, through ignorance, inattention or selfishness, an unreasonable practice prevails.<sup>20</sup> In an action under the Federal Employers' Liability Act for the death of an engineer who was killed by the collapse of a bridge, the trial court was requested to instruct the jury that if the carrier had caused the bridge to be inspected a short while before the collapse by experienced employes, and that the inspection was such as was ordinarily and customarily made of bridges of like character by other well regulated railroads in the same state, and that such inspection did not disclose the defects alleged in the complaint, the carrier discharged its full duty. The action of the trial court in refusing this instruction was sustained by the Circuit Court of Appeals.<sup>21</sup> The appellate court held that while testimony as to inspections by other railroads was admissible as evidence to be considered by the jury the refused instruction confused the controlling standard of ordinary care with what is only evidence of it.

**§ 535. Decisions of National Courts Control in Determining Negligence—Contrary Rulings.** Before the passage of the Federal Employers' Liability Act, state courts as well as the federal courts had uniformly held, that in construing and interpreting all federal statutes the state courts were controlled by the decisions of the national courts.<sup>22</sup> Adopting the same principle, in actions

19. *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 27 L. Ed. 605, 2 Sup. Ct. 932; *Chicago, M. & St. P. R. Co. v. Moore*, 92 C. C. A. 357, 166 Fed. 663, 23 L. R. A. (N. S.) 962; *Rickerd v. Chicago, St. P. M. & O. R. Co.*, 73 C. C. A. 139, 141 Fed. 905.

20. *Chicago Great Western R. Co. v. McDonough*, 88 C. C. A. 517, 161 Fed. 657.

21. *Midland Valley R. Co. v. Bell*, 155 C. C. A. 391, 242 Fed. 803.

22. *Illinois. Gilmore v. Sapp*, 100 Ill. 297; *Elwell v. Hicks*, 180 Ill. App. 554.



prosecuted in the courts of one state for injuries occurring in another state the construction which the courts of the latter state has placed upon common law principles of negligence has uniformly been followed by the courts where the actions were prosecuted although different from their own interpretation and construction of the common law.<sup>23</sup> But in determining when a carrier by railroad is guilty of negligence under the federal act, at least two courts carved out an exception to the general law that the decisions of the national courts control in construing the state statute.<sup>24</sup> In *Louisville & N. R. Co. v. Johnson*, cited in the notes, the courts held that in determining negligence under the national statute, if the evidence is sufficient to support a verdict under the state law, it is sufficient under the federal statute. The language of the court in the opinion on

**Indiana.** *First Nat. Bank of Richmond v. Turner*, 154 Ind. 456, 57 N. E. 110.

**Missouri.** *Beekman Lumber Co. v. Acme Harvester Co.*, 215 Mo. 221, 114 S. W. 1087; *Haseltine v. Central Nat. Bank*, 155 Mo. 66, 56 S. W. 395.

**Ohio.** *Board of Trustees v. Cuppett*, 52 Ohio St. 567, 40 N. E. 792.

**Texas.** *Pecos & N. T. R. Co. v. Cox*, 105 Tex. 40, 143 S. W. 606; *Bank of Garrison v. Malley*, 103 Tex. 562, 131 S. W. 1064.

**Washington.** *Hall v. Hall*, 41 Wash. 186, 111 Am. St. Rep. 1016, 83 Pac. 108.

23. **Georgia.** *White v. Seaboard Air Line Ry.*, 14 Ga. App. 139, 80 S. E. 667.

**Iowa.** *Brewster v. Chicago & N. W. Ry. Co.*, 114 Iowa 144, 89 Am. St. Rep. 348, 86 N. W. 221.

**Maryland.** *State ex rel. Allen v. Pittsburgh & C. R. Co.*, 45 Md. 41.

**Minnesota.** *Koecher v. Minneapolis, St. P. & S. S. M. R. Co.*, 122 Minn. 458, 142 N. W. 874.

**Mississippi.** *Pullman Palace car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

**Missouri.** *Chandler v. St. Louis & S. F. R. Co.*, 127 Mo. App. 34, 106 S. W. 553; *Root v. Kansas City Southern R. Co.*, 195 Mo. 348, 6 L. R. A. (N. S.) 212n, 92 S. W. 621.

**Ohio.** *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N. E. 69.

**Texas.** *Western U. Tel. Co. v. White*, — Tex. Civ. App. —, 162 S. W. 905.

24. *Louisville & N. R. Co. v. Winkler*, 162 Ky. 834, 9 N. C. C. A. 146, 173 S. W. 151; *Louisville & N. R. Co. v. Johnson's Adm'x*, 161 Ky. 824, 171 S. W. 847; *Helm v. Cincinnati, N. O. & T. P. R. Co.*, 156 Ky. 240, 160 S. W. 945; *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849.

this point is as follows: "In administering the Federal Employers' Liability Act in our courts, we think the practice and procedure followed in the trial of common-law actions generally should be observed in the trial of cases arising under this act. *C. & O. R. Co. v. Kelly*, 160 Ky. 296, 169 S. W. 736. In other words, except in so far as the act itself modifies or changes rules of practice and procedure or substantive law, cases arising under the act should be heard and determined in the state courts in the same manner as would like cases arising under the law prevailing in this state. If the evidence in a case heard and determined under this act would be sufficient to take the case to the jury and support the verdict if the suit had been brought under the state law, it would be sufficient to take the case to the jury and support the verdict if it was brought under the federal act." It is true that the law of procedure of the state where the action is pending governs in all actions under the Federal Act;<sup>25</sup> but as to "substantive law," referred to in this opinion, the decision is apparently in conflict with prior rulings of the national Supreme Court.<sup>26</sup> In the *McWhirter* case, cited, it was specifically held that the question whether a demurrer to the evidence should have been sustained or overruled, was a federal question to be determined in conformity with the rulings of the United States Supreme Court. In the *Horton* case, also cited in the notes, the trial court, on the question of negligence, in instructing the jury, formulated the charge in conformity with the law of the state. This was declared erroneous, the court saying: "In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by

25. Section 427, *supra*.

26. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. Cas. 1915B 475; *St. Louis, I. M.*

*A. 834 L. R. A. 1915C. 1, Ann. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858.

the local statute. But it is settled that since Congress, by the Act of 1908, took possession of the field of the employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded." In *Helm v. Cincinnati, N. O. & T. P. R. Co.*, cited in the notes, the court held that since the federal act did not undertake to define negligence, and in no way limited the application of the common law rule on the subject, and, since there was no federal common law, it was the common law of the state where the accident occurred to which the court must look in determining whether the acts complained of amount to negligence. In *Hawkins v. St. Louis & S. F. R. Co.*,<sup>27</sup> it was held that since Congress, in passing the Federal Employers' Liability Act, used such terms as "negligence," "contributory negligence" and "assumption of risk," and did not undertake to define them, it therefore followed that Congress intended for the statute, when called into operation, to be applied according to the construction of those common law terms by the various state courts. If the doctrine announced in these last two cases had been followed in the application of the federal act, then, it would often result that an act would be negligent in one state and not negligent in another state under the same law, that is, the federal act. Such discrimination would defeat one of the main objects of the national statute—one uniform rule of liability in all the states where a carrier by railroad is engaged in interstate commerce to its servants while employed in such commerce. It is true that prior to the enactment of the Federal Employers' Liability Act, there was no federal common law; but it has been held by the United States Supreme Court in the *Horton* case, cited *supra*, that Congress in passing the Federal Employers' Liability Act, adopted the rules and principles of the common law in determining when a carrier was negligent, under the first section of the act, with the exception that the common law fellow-servant doctrine was abolished. It would seem,

27. 189 Mo. App. 201, 174 S. W. 129.

therefore, that the decisions of the national courts in construing the national statute should control in determining negligence under the act and in construing and interpreting the common law principles concerning negligence so that there may be one rule of liability under this law, when applicable, in all state courts.<sup>28</sup> Certainly there must be some controlling authority in determining negligence under the act and if these questions are left to be determined according to the admittedly conflicting decisions of the courts of the several states, whose rulings are paramount and exclusive in their own jurisdiction, the question as to when a carrier is negligent under the federal statute would become a matter of the geography of the states and not of a one supreme law applying uniformly within its exclusive domain. Recognizing the inapplicability of state laws in determining negligence under the federal statute, the Kentucky Court of Appeals in another case, and also the Georgia Court of Appeals held that a law, providing that upon proof of an accident the presumption of negligence arises, did not control in an action for damages under the federal statute.<sup>29</sup>

28. **Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19.

**Kansas.** *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, L. R. A. 1917E 741, 162 Pac. 1153.

**Minnesota.** *Maijala v. Great Northern R. Co.*, 133 Minn. 301, 158 N. W. 430.

**Vermont.** *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925.

29. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932; *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340, 155 S. W. 742.

In *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849, which was reversed by the United States Supreme Court because of

application of the state rule, Judge Brown, in' the minority opinion, said: "In administering the Federal Liability Act, the state courts are bound by the construction and decisions of the federal courts. Since Congress has taken possession of the field of employers' liability to employees in interstate transportation by rail, all state laws upon the subject are superseded. *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062; *Mondou v. Ry. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327 (1 N. C. C. A. 875), 38 L. R. A. (N. S.) 44. Not only have state statutes been made inapplicable, but the common law as well, where a construction



**536. Conflicting Rulings Finally Eliminated by Controlling Decisions of National Supreme Court.** Most of the decisions discussed in the foregoing paragraph were delivered before the national Supreme Court, in a series of cases during the year 1915,<sup>30</sup> held that when Congress legislates and takes possession of a field within its power over interstate commerce, not only state statutes applying to the same subject are thereby abrogated and inoperative, but also the common law doctrines promulgated by state courts as well, where a construction has been placed upon the common law by the state courts, differing from that of the national courts. In other words, all federal laws relating to the subject matter of interstate commerce must be construed in the light of the decisions of the federal courts.<sup>31</sup> In all actions under the Employers' Liability Act, the applicable principles of the common law, as interpreted and applied in the federal courts, control to the exclusion of common law principles as applied and interpreted by state courts, if in conflict with the decisions of the national courts;<sup>32</sup> for, when Congress enacts a statute

has been placed upon it by the state courts differing from that of the federal courts. *South Covington R. Co. v. Finan*, 153 Ky. 340, 155 S. W. 742; *W. U. Tel. Co. v. Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815."

30 *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, L. R. A. 1917a 197, *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252.

In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts. *New Orleans and N. E. R. Co. v. Harris*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 535, decided June 3, 1918.

31 *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252.

32 *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406.

"While the Federal Employers' Liability Act does not define the

applicable to any phase of transportation, it thereby intends that the obligation of a carrier in respect to its duties within the statute, shall be governed by uniform rules in the place of the diverse requirements of state decisions.<sup>33</sup> The question of the responsibility of the carrier under such circumstances, is nevertheless federal although it must be resolved by the application of general principles of the common law. The principle is further exemplified in actions under the Employers' Liability Act when the claim is made and denied that there is no evidence tending to show liability. The ruling of a state court on such a question, if excepted to, is reviewable in the United States Supreme Court because it inherently involves the operation and effect of the federal law.<sup>34</sup> For example, in *Southern R. Co. v. Gray*, cited *supra*, the Supreme court of North Carolina, following a state rule, decided that there was sufficient evidence for

term 'negligence' of the carrier, it has been determined that the expression as used in the act is the common law negligence of master and servant as defined by the federal courts, and that the common law as interpreted and applied in the federal courts determines what constitutes negligence; and, if a state court differs with the federal courts as to what will or will not constitute negligence, the interpretation of the federal courts necessarily controls." *Roebuck v. Atchison, T. & S. F. R. Co.* 99 Kan. 544, L. R. A. 1917E 741, 162 Pac. 1153.

"Rights and obligations under the Federal Employers' Liability Act depend upon that act and applicable principles of common law as interpreted and applied in federal courts". *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19.

The rights and liabilities of parties under federal statutes must

be determined in the light of applicable common law principles as accepted and applied in federal tribunals. *Continental Paper Bag Co. v. Maine Cent. R. Co.*, 115 Me. 449, 99 Atl. 259.

"We recognize the fact that it is the common law as interpreted and applied in the federal courts that is to control". *Robie v. Boston & M. R. R.*, —Vt. —, 100 Atl. 925.

33. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469.

34. *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Seaboard Air Line Ry. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481; *St. Louis, I. M. & S. Ry. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. 616.

the cause to be submitted to the jury;<sup>35</sup> but on writ of error, the national Supreme Court held that such action was under the federal act, and the rights and obligations depend upon that statute and the applicable principles of the common law as interpreted and applied in the federal court. Applying these principles, it found, upon an examination of the evidence, that there was not sufficient testimony to show negligence under the most favorable view of the testimony to the plaintiff. "It would seem," said Judge Trimble in an opinion which is in harmony with the foregoing cases,<sup>36</sup> "that since the Employer's Liability Act is a general law enacted by Congress to regulate the responsibility of interstate common carriers by railroad to their employes engaged in carrying on commerce between the States, the purpose of Congress was to establish one general uniform law in that regard, and that, therefore, not only the construction of that Act by the Federal courts but the rules of decision adopted therein in applying and enforcing the Act, should be binding upon the State courts. It is so held in regard to the liability of an interstate common carrier to an interstate shipper for loss of goods created by the Interstate Commerce Act. . . . It is hard to see how a State court, when called upon to apply and enforce a Federal statute, can disregard the rules of decision in regard thereto laid down by the Federal courts and follow its, the State court's, own rules not in harmony therewith. If it can, then the responsibility of an interstate carrier to its employees in interstate commerce will vary according to the view the various States may take of the common-law rule concerning assumption of risk. But Congress sought to *regulate* this responsibility, and having acted in the matter, it established a policy for all, and the liability as determined by the several States is superseded by this one general supreme law. . . . It does not seem that, in a suit under a general Federal

35. *Gray v. Southern R. Co.*, 167 N. C. 433, 83 S. E. 849.

36. *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202, 177 S. W. 1127.

law intended as a uniform regulation affecting carriers and its employees engaged in interstate commerce, a State court will be allowed to apply its own particular rule which is not in harmony with the Federal rule. Especially does this appear to be so when a writ of error can be taken to the Federal court of last resort whose duty it will be to apply and enforce a general Federal law having to do with such an exclusively Federal subject as interstate commerce. It is not apprehended that, in such case, the United States Supreme Court will abandon its rule as to assumption of risk and apply the state rules".<sup>37</sup>

**§ 537. Negligent Act Must have been Committed while Employee was Acting within Scope of Employment.** A carrier is not liable for every act of negligence causing injury to one employe by another. The negligent act causing the injury must have been committed while the employe at fault was in the prosecution of the carrier's business; for, when an employe voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employe.<sup>38</sup> When the negligent act which causes an in-

37. See also *St. Louis, I. M. & S. R. Co. v. Steel*, 129 Ark. 520, 15 N. C. C. A. 49, 197 S. W. 288.

38. *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683, 12 N. C. C. A. 1083, in which the court said: "It is most earnestly insisted that the findings establish that Campbell was not in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employ-

ment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of his employment or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him it of course does not necessarily follow that he did



jury to or the death of an employe had no relation whatever to the employment, the carrier is not liable, for the employe at fault must have been, when committing the act, within the scope of his employment.<sup>39</sup> And if an em-

this willfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment. To hold otherwise would have startling consequences. The running of trains on telegraphic orders is an everyday occurrence on every railroad in the country. Thousands of cases occur every day and every night where a failure by conductor or engineer to comprehend or to remember the message of the train dispatcher may endanger the lives of employees and passengers. We are not aware that in any case it has been seriously contended that because an engineer violated the orders he went outside of the scope of the employment. If he did so, in the sense of absolving the employer from the duty of exercising care for his safety, it is not easy to see upon what principle the employer's liability to passengers or to fellow employees for the consequences of his negligence could be maintained. The unsoundness

of the contention is so apparent that further discussion is unnecessary."

39. **Florida.** Seaboard Air Line Ry. Co. v. Hess, — Fla. — 74 So. 500.

**Kansas.** Martin v. Atchinson, T. & S. F. R. Co., 93 Kan. 681, 145 Pac. 849.

**Kentucky.** Cincinnati, N. O. & T. P. R. Co. v. Wilson's Adm'r, 161 Ky. 640, 171 S. W. 430.

**Minnesota.** Rief v. Great Northern R. Co., 126 Minn. 430, 148 N. W. 309.

**Montana.** Moyse v. Northern Pac. R. Co., 41 Mont. 272, 108 Pac. 1062.

**Oklahoma.** Missouri, K. & T. Ry. Co. v. West, 38 Okla. 581, 134 Pac. 655.

**Washington.** Vanordstrand v. Northern Pac. R. Co., 86 Wash. 655, 151 Pac. 89; Reeve v. Northern Pac. R. Co., 82 Wash. 268, N. C. C. A. 167, 144 Pac. 63, Hobbs v. Great Northern R. Co., 80 Wash. 678, L. R. A. 1915D 503, 142 Pac. 20.

"The employe, to come within the provisions of either the state law or the federal act must receive his injuries while in the course of his employment. If he voluntarily undertakes the performance of a duty for which he was not employed, he acts at his own peril and does not come within the terms of the act. \* \* \* Counsel for appellee insists, however, that these well settled rules have been changed by the Federal Employer's Liability Act, and that all

ploye is injured or killed at a time and place and from a cause disconnected with his employment for the

that is necessary to be shown to recover under that act is that an employe was injured while engaged in interstate commerce, no matter whether in the course of his employment or not. The cases cited by him do not, as we read them, so hold". *Byram v. Illinois Cent. R. Co.*, 172 Iowa 631, 154 N. W. 1006.

"It is a common thing in these days for statutes to be enacted abrogating some of the common-law defenses of the master to actions by an employe for injuries sustained in his employment; and very frequently statutes, such as mining acts and factory acts, compensation acts, and employers' liability acts, impose upon the employer duties and liabilities which were unknown to the common law. Except where some such statutory provision governs, we are aware of no rule of law adopted by the courts which goes to the extent of holding the master liable for the willful and criminal assault by one employe upon another, where the assault was not expressly or impliedly authorized or within the scope of the employment. As was said in *Crelly v. Telephone Co.*, supra: 'The act, as in this instance, may have been done while the servant was in the master's service; but, unless it was expressly or impliedly authorized, or within the scope of the employment, the servant alone is responsible. In the same volume of the Texas reports in which the decision we have quoted from, supra, is published, there appears the case of *Medlin Milling Co. v. Boutwell*, 104 Tex.

87, 133 S. W. 1042, 34 L. R. A. (N. S.) 109. In that case the syllabus reads: 'The master is not liable to a servant for an assault upon him by other servants in no way connected with their duties to the employer. As where employes of a milling company, in pursuance of a custom before practiced, undertook to 'initiate' a new employe into the service by stretching him across a barrel and 'paddling' him and he was injured in resisting such violence. The knowledge and acquiescence of officers or managers of a company in a custom of rude frolic by employes in receiving a new one into the service, amounting to an assault and inflicting injury, was not within the scope of their authority or in the company's service, and it was not rendered liable to the injured party by such acquiescence. In the opinion it was said: 'It is not the legal duty of the master to protect the servant from unlawful assaults by strangers, and another servant committing such an assault, not in the scope of his employment, must be regarded as a stranger. It is plain that it could not have been the intention of Congress to make the carrier liable for injury or death to an employe occasioned by the act of a stranger. We are fully in harmony with the liberal interpretation of the federal Employers' Liability Act by the federal courts generally; but we cannot conceive it to have been the intention of Congress to impose upon the carrier duties and obligations save those of an employer; nor that it was the pur-

carrier, the carrier is not liable for the statute requires the servant injured to have been at the time employed in interstate commerce.<sup>40</sup> In *Reeve v. Northern P. Ry. Co.*, cited in the notes, plaintiff was a laborer in the employ of the railroad company, and, as a part of his duties, supplied baggage cars of the defendant with water and fuel. When injured he was sitting on the floor of a baggage car in the door with his feet hanging outside of the door resting on the iron steps or stirrups which hung below. While so sitting two other employes of the company began wrestling or scuffling in the body of the car and while so engaged, whether intentional or not, did not appear in the evidence, one of them brushed against or pushed the plaintiff, causing him to fall to the ground and he sustained injuries. Under these facts, in an action under the Federal Employers' Liability Act, the court, in denying a recovery, held that a railroad company was not liable unless the negligent act occurred while the employes were doing some act required of them in the prosecution of the carrier's business and that the federal statute was not intended to cover negligent acts of an employe in no way connected with the business, the prosecution of which he was employed to aid. In *Cincinnati, N. O. & T. P. Ry. Co. v. Wilson*, cited in

pose to impose new obligations not unusually imposed upon employers, except as the law of master and servant is by the express terms of the act itself limited or restricted." *Roebuck v. Atchison, T. & S. F. R. Co.*, 99 Kan. 544, L. R. A. 1917E 741, 162 Pac. 1153.

40. *Hurst v. Chicago, R. I. & P. R. Co.*, 49 Iowa 76; *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 52 L. R. A. 326, 83 Am. St. Rep. 284, *Padgett v. Seaboard Air Line Ry.*, 99 S. C. 364, 83 S. E. 633; *Ry.*, 97 S. C. 50, 81 S. E. 283; *Ewald v. Chicago & W., Ry. Co.*,

70 Wis. 420, 5 Am. St. Rep. 178, 36 N. W. 12, 591.

A brakeman on an interstate train after reaching the terminal with his train and before he was discharged for the day, went into a saloon near the railroad yards to get a drink. While returning to the yards he was struck and injured by a car, due to the negligence of other employes. The court held that notwithstanding the fact that he was returning from a personal errand, he was nevertheless employed in interstate commerce. *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

the notes, a section foreman on a train standing on the passing track at a station, erroneously thinking that another train approaching at a rapid rate of speed was about to collide with it, warned his men to jump, which they did, the foreman with them. The decedent, one of the section men under him, ran across the main line of the railroad at that place and was struck and killed by the other train. Answering a contention that the foreman was not acting within the course of his employment, the court held that the act of the foreman in shouting and warning the men, was one within the scope of his employment and was an act fairly imputable to the master imposing legal liability therefor. In *Rief v. Great Northern Ry. Co.*, cited, the plaintiff was a "student brakeman" receiving no compensation from the railroad company. For 12 days previous to the injury he had been upon defendant's trains in that capacity. At the time he entered upon his course of learning he signed a written statement in which he agreed that he should receive no compensation and that he would not be held to be a servant but a licensee upon the property of the defendant. He was injured while attempting to descend from a box car to throw a switch by striking a coal chute close to the track. In an action under the federal act the court held that the plaintiff was an employe of the defendant as a matter of law, as the testimony showed that he was expected to perform and did perform such tasks as were assigned him by members of the crew in charge of the trains. He helped load and unload freight at way stations, threw switches and did whatever he was ordered to do in the operation of a train. In *Hobbs v. Great Northern Ry. Co.*, cited, the decedent was killed while riding upon the pilot of an engine. He was a hostler's helper and his last work was placing sand in the engine. In doing this work the deceased was not required to ride on a pilot. No one knew why he stepped upon the pilot. The engine in moving collided with the footboard of another switch engine, which was not visible because of escaping steam, and this caused decedent's death. There was a rule of the railroad company for-



bidding employes to ride on engine pilots and the decedent, in addition, had been specifically told not to ride on pilots. The court, in denying that the railroad company was liable, said: "The rule of liability against a railway company engaged in interstate commerce is predicated upon the duty of the company to furnish its servant with a reasonably safe place in which to perform the work it requires of him or while he is about in those places which are incident to his work, and this duty is incident to all places where the employe must necessarily be in connection with his employment. But that duty is not incident to his place where a servant is not required to be nor expected to be in the performance of his work. Nor does it cover the servant when he is not within the scope of his employment or doing some act which is not incidental to his employment. This rule is sustained by all authorities and the federal act in no wise attempts to change it. Unless the evidence in this case shows that the deceased was upon the pilot of his engine in discharge of some duty required by the railroad company, then the railroad company owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted and no authorities need be cited to sustain it. There is no evidence in this record that the deceased was required to do any act which would place him upon the pilot of the engine. All the evidence on this subject is to the contrary. So far as we can find, whatever it was that caused him to step upon the pilot, it was his own purpose, not in any way connected with his work as a hostler's helper. If it was his purpose to engage in any task, so far as this record goes, in so doing he was a volunteer without appellant's direction or knowledge and so far as the law is concerned the result is the same. If we could find anything in the evidence which would justify a different conclusion, however meager it might be, we would submit to the verdict as determinative of the fact. But we cannot find it and such being the case, however unfortunate or distressing the circumstances may be, it is our duty to so hold."

§ 538. **Negligence Must be Proximate Cause of Injury.** For the plaintiff to recover under the Federal Employers' Liability Act it is not sufficient that he prove negligence and injury under conditions within the terms of the act. To create a jury issue, the plaintiff must introduce proof tending to show that the alleged negligence was the proximate cause of the damage.<sup>41</sup> The

41. **United States.** *Union Pac. R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed.—38 Sup. Ct. 318, aff'g 99 Neb. 349, 156 N. W. 765; *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, 60 L. Ed. 317, 36 Sup. Ct. 121, 10 N. C. C. A. 778, *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S., 243, 59 L. Ed. 1290 35 Sup. Ct. 785; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Pennsylvania R. Co. v. Glas*, 152 C. C. A. 244, 239 Fed. 256; *Delaware & H. Co. v. Ketz*, 147 C. C. A. 101, 233 Fed. 31; *Clark v. Erie R. Co.*, 230 Fed. 478; *Smith v. Illinois Cent. R. Co.*, 119 C. C. A. 33, 200 Fed. 553; *Atchison, T. & S. F. R. Co. v. De Sedillo*, 135 C. C. A. 358, 219 Fed. 686.

**Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19.

**Georgia.** *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

**Indiana.** *Chicago & E. R. Co. v. Freighter*, — Ind. App. —, 114 N. E. 659.

**Iowa.** *Rhodes v. Chicago, R. I. & P. Ry. Co.*, — Iowa —, 161 N. W. 652.

**Kentucky.** *Judd's Adm'x v. Southern R. Co.*, 171 Ky. 832, 188

S. W. 880; *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621;

**Michigan.** *Salabrin v. Ann Arbor R. Co.*, 194 Mich. 458, 160 N. W. 552; *Chapman v. United States Ex. Co.*, 192 Mich. 654, 159 N. W. 308.

**Minnesota.** *Beecroft v. Great Northern R. Co.*, 134 Minn. 86, 158 N. W. 800;

**Mississippi.** *Hooks v. New Orleans & N. E. R. Co.*, 111 Miss. 743, 72 So. 147.

**Missouri.** *State ex rel. Lusk v. Ellison*, 271 Mo. 463, 196 S. W. 1088; *Strother v. Chicago, B. & Q. R. Co. (Mo.)*, 188 S. W. 1102; *Haines v. Chicago, R. I. & P. Ry. Co.*, 193 Mo. App. 453, 185 S. W. 1187; *Fish v. Chicago, R. I. & P. R. Co.*, 263 Mo. 106, 8 N. C. C. A. 538, *Ann Cas.* 1916B 147, 172 S. W. 340.

**New York.** *White v. Lehigh Valley R. Co.*, 220 N. Y. 131, 115 N. E. 439.

**Oklahoma.** *St. Louis & S. F. R. Co. v. Snowden*, 48 Okla. 115, 149 Pac. 1083.

**South Carolina.** *Steele v. Atlantic Coast Line R. Co.*, 103 S. C. 102, 87 S. E. 639.

**Vermont.** *White's Adm'x, v. Central Vermont R. Co.*, 87 Vt. 330, 89 Atl. 618.

**Virginia.** *Virginia & S. W. R. Co. v. Hill*, 119 Va. 837, 89 S. E. 895.

character of evidence necessary to prove such causation must depend largely upon the circumstances of each case.

**Washington.** Bjornsen v. Northern Pac. R. Co., 84 Wash. 220, 146 Pac. 575.

**West Virginia.** Easter v. Virginian R. Co., 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

**Wisconsin.** Calhoun v. Great Northern R. Co., 162 Wis. 264, 156 N. W. 198.

Where the facts relied upon bring the case within the rule that where an injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability, no recovery can be had. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. 275.

The federal decisions discussing the nature and character of the term "proximate cause" are reviewed by the court in Delaware & H. Co. v. Ketzel, 147 C. C. A. 101, 233 Fed. 31, a case under the Federal Employers' Liability Act.

"To justify a recovery for an injury caused by a train striking a section hand while engaged in repairing a track, it must be shown that the proximate cause of his injury was the railway company's neglect of some duty due to him in respect to his protection from injury by passing trains." Southern Ry. Co. v. Blackwell. — Ga. App. —, 93 S. E. 321, an action under the Federal Act.

It is not sufficient merely to show that the decedent was killed by the defendant and that the defendant was guilty of negligence. It must further appear that his death was caused by the proven

negligence. Sutton's Adm'r v. Louisville & N. R. Co., 168 Ky. 81, 181 S. W. 938.

If it is a matter of fair inference by the jury that an unexpected jerk came from the negligent giving of a stop signal by the conductor, causing the decedent's death, the question of proximate cause is not a mere matter of speculation. Thompson v. Minneapolis & St. L. R. Co., 133 Minn. 203, 158 N. W. 42.

"The plaintiff must prove that the death of his intestate came from some act for the result of which the defendant is liable. It is not for the defendant to show that it came from some act for which it is not responsible. The proof need not be direct or positive. It must leave the result more than conjectural." Hurley v. Illinois Cent. R. Co., 133 Minn. 101, 157 N. W. 1005.

The evidence must point out, with a reasonable degree of certainty, that the death of plaintiff's intestate was directly due, either in whole or in part, to the negligence of some one or more of defendant's servants other than himself. Hull v. Virginian R. Co., 78 W. Va. 25, 88 S. E. 1060.

"There is also a plain elementary principle of negligence law that to constitute actionable negligence there must be a concurrence of two things; First, negligence; and, second, injury resulting as a proximate cause of it. It matters not how negligent a person may be; his negligence, unless the injuries complained of were the proximate result of it, will not authorize a recovery in

The inquiry whether proof having such tendency has been introduced, is not to be solved by indulging in mere surmises or conjecture or by resorting to imaginary possibilities, for to do so would but resolve the question to the generic rule of liability as an insurer. Applying these principles to a case under the act where the negligence charged was a violation of the national Hours of Service Act, the national Supreme Court has held that proof of working overtime does not create an unconditional liability for accidents in the absence of proof showing a causal connection between the accident and the working overtime.<sup>42</sup> An injury which is the natural and probable result of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever of the injury.<sup>43</sup> The natural consequence of an act is the consequence which ordinarily follows it, the result which may reasonably be anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is not to follow it.<sup>44</sup>

damages." *Cincinnati, N. O. & T. P. R. Co. v. Perkins' Adm'r*, 177 Ky 88, 197 S. W. 526.

The negligent failure of a railroad company to have lights burning about its station was not the proximate cause of an injury to a station master who was assaulted by a robber at night while attending to his duties, the assault of the robber not being a natural and probable consequence of the failure to keep the lights burning. *Carter v. Atlantic C. L. R. Co.*, — S. C. —, 95 S. E. 357.

42. *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, 60 L. Ed. 317, 36 Sup. Ct. 121, 10 N. C. C. A. 778; *St. Louis, I. M. &*

*S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858; *Helm v. Cincinnati, N. O. & T. P. R. Co.*, 156 Ky. 240, 160 S. W. 945; *Bjornsen v. Northern Pac. R. Co.*, 84 Wash. 220, 146 Pac. 575.

43. *Atchison, T. & S. F. R. Co. v. Calhoun*, 213 U. S. 1, 53 L. Ed. 671, 29 Sup. Ct. 321; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Delaware & H. Co. v. Ketz*, 147 C. C. A. 101, 233 Fed. 31.

44. *Armour & Co. v. Harcrow*, 133 C. C. A. 218, 217 Fed. 224, 7 N. C. C. A. 325; *Chicago, B. & Q. R. Co. v. Richardson*, 121 C. C. A. 144, 202 Fed. 836; *St. Louis, K. C. & C. R. Co. v. Conway*, 86



### § 539. Meaning of the Phrase "In Whole or in Part."

Liability is shown under the federal act when the plaintiff proves that the injury or death was due either "in whole or in part" to negligence of the defendant.<sup>45</sup> This phrase is an adoption of the common law doctrine of concurrent causes. Although causes for which the carrier is not liable contribute directly to produce the injury, yet if a cause for which the carrier is liable, that is, a negligent act of any other employe or a defect or insufficiency due to negligence in equipment or works, contributes also as a cause, without which the injury would not have occurred, the carrier is still liable.<sup>46</sup> The quoted phrase means nothing more or less than that the negligent act must be the proximate cause under the federal of the injury and, in cases of doubt, to ascertain when a negligent act is the proximate cause under the federal law, decisions of courts passing upon such questions under the common law, are applicable.<sup>47</sup>

C. C. A. 1, 156 Fed. 234; *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 5 C. C. A. 347, 55 Fed. 949, 20 L. R. A. 582.

45. *Union Pac. R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. —, 38 Sup. Ct. 318, aff'g 99 Neb. 349, 156 N. W. 765;

46. *Louisville & N. R. Co., v. Paschal*, 145 Ga. 521, 89 S. E. 620; *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621; *O'Connor v. Chicago, M. & St. P. R. Co.*, 163 Wis. 653, 158 N. W. 343; *Molzoff v. Chicago, M. & St. P. R. Co.*, 162 Wis. 451, 11 N. C. C. A. 273, 156 N. W. 467; *Calhoun v. Great Northern R. Co.*, 162 Wis. 264, 156 N. W. 198.

Under the federal act it is sufficient if the injury to an employe results in whole or in part from the negligence of any of the officers, agents, or employes of the common carrier. *Molzoff v. Chicago M. & St. P. R. Co.*, *supra*.

47. *Texas & P. Ry. Co. v. Stewart*, 228 U. S. 357, 57 L. Ed. 875, 33 Sup. Ct. 548; *Atchison, T. & S. F. Co. v. Calhoun*, 213 U. S. 1, 53 L. Ed. 671, 29 Sup. Ct. 321; *Choctaw, O. & G. R. Co. v. Holloway*, 191 U. S. 334, 48 L. Ed. 207, 24 Sup. Ct. 102; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 28 L. Ed. 410, 4 Sup. Ct. 369; *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Armour & Co. v. Harcrow*, 133 C. C. A. 218, 217 Fed. 224, 7 N. C. C. A. 325; *Union Pac. R. Co. v. Fuller*, 122 C. C. A. 359, 204 Fed. 45; *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887; *Shugart v. Atlanta, K. & N. Ry. Co.*, 66 C. C. A. 379, 133 Fed. 505; *Missouri, K. & T. R. Co. v. Byrne*, 40 C. C. A. 402, 100 Fed. 359; *St. Louis, I. M. & S. Ry. Co. v. Needham*, 16 C. C. A. 457, 69

§ 540. **State Statutes Creating Presumption of Negligence from Injury Inapplicable to Interstate Employees.** When Congress regulates a particular subject under the power granted to it by commerce clause, state laws applying to the same subject are suspended.<sup>48</sup> State legislature cannot supplement a national statute by prescribing additional regulations governing the same field.<sup>49</sup> When, therefore, Congress enacted the Federal Employers' Liability Act prescribing liability for injuries in interstate commerce, state laws creating a presumption of negligence upon proof of an injury were inoperative as to all employees of common carriers by railroad injured or killed while engaged in interstate commerce.<sup>50</sup> Thus, a flagman on an interstate train

Fed. 823; *Travelers' Ins. Co. of Hartford v. Melick*, 12 C. C. A. 544, 65 Fed. 178, 27 L. R. A. 629; *Bowers v. Southern R. Co.*, 10 Ga. App. 367, 73 S. E. 677.

48. *New York Cent. R. Co. v. Winfield*, 244 U. S. 147, 61 L. Ed. 1045, 37 Sup. Ct. 546, 14 N. C. C. A. 680, Ann. Cas. 1917D 1139; *Southern Pac. Co. v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. 524, L. R. A. 1917E 900; *Texas & P. R. Co., v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 60 L. Ed. 140, 36 Sup. Ct. 27; *Erie R. Co. v. New York*, 233 U. S. 671, 58 L. Ed. 1149, 34 Sup. Ct. 756, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D 138; *Taylor v. Taylor*, 232 U. S. 363, 58 L. Ed. 638, 34 Sup. Ct. 350, 6 N. C. C. A. 436.

49. *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914C 176; *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 539, 10 L. Ed. 1060.

50. *United States. Louisville & N. R. Co. v. Rhoda*, 238 U. S. 608,

59 L. Ed. 1487, 35 Sup. Ct. 662 (men. dec.).

**Arkansas.** *Kansas City Southern R. Co. v. Cook*, 100 Ark. 467, 140 S. W. 579.

**Florida.** *Louisville & N. R. Co. v. Rhoda*, — Fla. —, 74 So. 19.

**Georgia.** *Temples v. Central of Georgia R. Co.*, 19 Ga. App. 307, 91 S. E. 502; *Ivey v. Louisville & N. R. Co.*, 18 Ga. App. 434, 89 S. E. 629; *Central of Georgia R. Co. v. De Loach*, 18 Ga. App. 362, 89 S. E. 433; *Alabama Great Southern R. Co. v. Tidwell*, 145 Ga. 190, 88 S. E. 939; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932; *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

**Kentucky.** *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340, 155 S. W. 742.

"Under the state statute the servant need only to prove that he was injured by reason of a defective appliance to make a prima facie case; while, under the federal statute, the presumption prevails, even after proof of the de-

on arriving at his destination point, was ordered to go to the yardmaster's office. In complying with this order, he was required to cross several yard tracks. Shortly thereafter his body was found between the rails of the track over which the switch engine had just passed. There was no evidence of a negligent failure on the part of the engineer or the fireman on the switch engine to warn him. In fact, both testified that they did not see anybody on the track. Upon these facts the trial court charged the jury in conformity with the Florida statute creating a presumption of negligence upon proof of an injury in the operation of a locomotive. This decision was affirmed by the supreme court of Florida.<sup>51</sup> But on writ of error the national Supreme Court reversed the judgment without opinion.<sup>52</sup> Upon the next trial the trial court again instructed the jury that it devolved upon the defendant to prove that it was not negligent, and refused to instruct that the burden of showing the decedent's death was due to negligence, was upon the plaintiff. Another verdict for the plaintiff was returned but on second appeal, the judgment entered thereon was reversed by the Florida supreme court, on the ground that the state law shifting the burden of proof was superseded as to all interstate employes by the enactment of the federal statute.<sup>53</sup> A statute of the state of Arkansas provides, in effect, that where an injury is

fect, that the railway company was not aware of its existence; and, until it has shown that the railway company knew, or, in the exercise of ordinary care, should have known, of the defect, it is not charged with that knowledge." *St. Louis, I. M. & S. R. Co. v. Ingram*, 124 Ark. 298, 187 S. W. 452.

In an action under the federal act it was error to instruct the jury that the burden of proof was upon the plaintiff in the first instance to show that he was injured, and that, upon his show-

ing it, the burden would be upon the defendant to show that it used all ordinary and reasonable care and diligence to prevent the injury. *Alabama Great Southern R. Co. v. Tidwell*, *supra*.

*Contra*: *Yazoo & M. V. R. Co. v. Mullins*, 115 Miss. 343, 76 So. 147.

51. *Louisville & N. R. Co. v. Rhoda*, 71 Fla. 526, 71 So. 369.

52. *Louisville & N. R. Co. v. Rhoda*, 238 U. S. 608, 59 L. Ed. 1487, 35 Sup. Ct. 662 (men. dec.).

53. *Louisville & N. R. Co. v. Rhoda*. — Fla. —, 74 So. 19.

caused by the operation of a train, a *prima facie* case against the carrier is shown, and the duty is then cast upon it to establish due care. The supreme court of that state held that the statute did not apply in an action under the Federal Employers' Liability Act and that instructions of a trial court applying the state statute were erroneous.<sup>54</sup>

**§ 541. Mississippi "Prima Facie" Statute Held Applicable to Actions under Federal Act.** But the supreme court of Mississippi in a decision not in harmony with the cases cited in the foregoing paragraph, has held that a statute of that state providing that in all actions against railroad companies for damages due to persons, proof of injury inflicted by the running of locomotive cars shall be *prima facie* evidence of negligence on the part of the company, governs in actions under the Federal Employers' Liability Act.<sup>55</sup> "Counsel for appellant," said the court in this case, "urges that our *prima facie* statute (section 1985, Code of 1906) is not applicable in the case before us because this suit is governed by the Federal Employers' Liability Act, and that the *prima facie* statute is not a rule of evidence, but

54. *St. Louis, I. M. & S. Ry. Co. v. Steel*, 129 Ark. 520, 15 N. C. C. A. 49, 197 S. W. 288, in which the court said: "For the sake of uniformity, the decisions of the Supreme Court of the United States should and must control in determining the issue of negligence where the Employers' Liability Act governs; for, as is said by Mr. Roberts: 'Certainly there must be some controlling authority in determining negligence under this act, and if these questions are left to be determined according to the admittedly conflicting decisions of the courts of the several states, whose rulings are paramount and exclusive in their own jurisdiction, the ques-

tion as to when a carrier is negligent under the federal statute would become a matter of the geography of the states and not of a one supreme law applying uniformly within its exclusive domain.' 'Such discrimination,' he continues, 'would defeat one of the main objects of the national statute—one uniform rule of liability in all the states where a carrier by railroad is engaged in interstate commerce to its servants while employed in such commerce.' Roberts' *Injuries Interstate Employes*, pp. 37, 38." }

55. *Yazoo & M. V. R. Co. v. Mullins*, 115 Miss. 343, 76 So. 147.



that it is a substantive law and gives a substantial right in conflict with the federal act. It is argued that the *prima facie* statute is a state law which in effect creates a liability by virtue of the presumption of negligence from the infliction of injury by the running of cars, and that this statute conflicts with the federal act in matters of substance affecting liability, and is not a mere rule of evidence. The recent case of *Louisville, etc., R. Co. v. Rhoda* (Fla.) 74 So. 19, is cited as authority for the position taken by the appellant. We have reviewed this case and several others cited by counsel, and, without entering into a discussion of the holding in the Florida case, we are clearly of the opinion that our *prima facie* statute is not in conflict with the federal act, but that it is a rule of evidence, the *lex fori*, and as our state courts have concurrent jurisdiction with the federal courts of causes arising under the federal act the law of the forum must govern in the trial of such cases. The authorities cited by counsel fail to convince us that our beneficent *prima facie* statute is inapplicable to cases under the federal act. We therefore announce here again that the statute (section 1985, Code of 1906) is applicable as a rule of evidence in the courts of our state, regardless of whether the cause of action arises under the federal act or the state law.<sup>55a</sup>

**§ 542. Sufficiency of Evidence of Negligence to Submit Cause to Jury not Governed by Decisions of State Courts.** The question whether there is sufficient evidence of negligence for the cause to be submitted to the jury must be determined by applicable common law principles as interpreted and applied in the national courts, and not by the decisions of the courts of the several states when in conflict therewith;<sup>56</sup> for one of

55a. *Contra*, *New Orleans & N. E. R. Co. v. Harris*, 246 U. S. —, 62 L. Ed. —, 38 Sup. Ct. 535, in which the court held that the Mississippi "Prima Facie Act" was not

applicable to actions under the federal Act.

56. *Union Pac. R. Co. v. Huxall*, 245 U. S. 535, 62 L. Ed. —, 38 Sup. Ct. 187; *Southern R. Co. v.*

the purposes of Congress in the enactment of the Federal Employers' Liability Act was to have a uniform rule throughout the United States. The federal decisions must, therefore, be looked to to determine whether enough facts have been introduced for the jury to infer negligence as that question involves matters of substantive law and not procedure. In a series of cases before the supreme court of South Carolina, it has been held that as the Federal Employers' Liability Act makes no specific regulation as to the quantity, and quality of negligence necessary for the cause to be submitted to the jury, the state law and the decisions of the state courts govern.<sup>57</sup> But these cases announce a doctrine that is clearly not in harmony with the controlling decisions of the national Supreme Court.<sup>58</sup>

**§ 543. Effect of State Law Prohibiting Employment of Minors in Determining Negligence.** A statute of a state prohibiting the employment of minors under certain ages, and prescribing that a violation thereof shall be *prima facie* evidence of negligence, is not ap-

Gray, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265; *Ann. Cas.* 1916B 252; *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, *L. R. A.* 1915C 1, *Ann. Cas.* 1915B 475.

57. *Mulligan v. Atlantic Coast Line R. Co.*, 104 S. C. 173, 88 S. E. 445; *Dutton v. Atlantic Coast Line R. Co.*, 104 S. C. 16, 88 S. E. 263; *Koennecke v. Seaboard Air Line Ry.*, 101 S. C. 86, 85 S. E. 374; *Howell v. Atlantic Coast Line R. Co.*, 99 S. C. 417, 83 S. E. 639; *Bennett v. Southern Ry.*—

*Carolina Division*, 98 S. C. 42, 79 S. E. 710.

58. *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. Ed. 825, 36 Sup. Ct. 410, *L. R. A.* 1917A 197; *Cleveland, C., C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177. See also cases cited under Note 1, *supra*. In *Southern R. Co. v. Prescott*, *supra*, the national Supreme Court held that the rule adopted by the supreme court of South Carolina shifting the burden of proof, upon certain contingencies, in actions for loss or damage to interstate shipments had been superseded upon the enactment of the Carmack amendment.

plicable to injuries arising in interstate commerce of employes working for common carriers by railroad.<sup>59</sup> In an action under the federal act, a trial court gave effect to a state statute forbidding the employment of minors under 18 between 10 p. m. and 5 a. m. For this error the cause was reversed, the supreme court of the state holding that the legislation of Congress over the subject matter of interstate commerce could not be supplemented by state laws even when not in conflict therewith.<sup>60</sup>

§ 544. **Applicability of Rule of Res Ipsa Loquitur to Actions under Federal Acts—Conflicting Rulings.** As construed by the Supreme Court of the United States, the doctrine of *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; that they constitute evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. The rule does not convert the defendant's general issue into an affirmative defense and when all the evidence is in, the question is still for the jury to determine whether the preponderance is with the plaintiff.<sup>61</sup> Ordinarily in actions by an employe against an employer for damages due to personal injuries for failing in the performance of duty, the mere fact of the injury raises no such presumption of negligence on the part of the employer as in the case of a passenger against a common carrier, and the burden of proving negligence rests upon the plaintiff;<sup>62</sup> but the *res ipsa loquitur* doctrine has been applied in a qualified form and

59. *Maijala v. Great Northern R. Co.*, 133 Minn. 301, 158 N. W. 430.

60. *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148, 162 Pac. 111.

61. *Sweeney v. Erving*, 228 U. S. 233, 57 L. Ed. 815, 33 Sup. Ct. 416, Ann. Cas. 1914D 905.

62. *Southern Ry.-Carolina Division v. Bennett*, 233 U. S. 80, 58 L. Ed. 860, 34 Sup. Ct. 566, 10

in exceptional cases even between master and servant.<sup>63</sup> Where the circumstances of an accident are of such a nature as to constitute circumstantial evidence tending to show negligence, the rule has been enforced. The courts are not in harmony as to the applicability of the doctrine in actions under the federal act; some have gone to the extent of holding that it is never applicable to actions by employes against carriers under the federal act while others hold that an employe is entitled to the benefit of the maxim in exceptional cases when the facts of the particular case warrant an inference of negligence.<sup>64</sup> "In its extreme application," said Judge Evans

N. C. C. A. 853; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. 275; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. 777; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. 707; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. Ed. 624, 15 Sup. Ct. 491; *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 38 L. Ed. 597, 14 Sup. Ct. 756; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. Ed. 772, 13 Sup. Ct. 914.

"The doctrine of *res ipsa liquitur* is inapplicable to actions between employers and employes for negligence or other wrongs. The happening of an accident which injures an employe raises no presumption of wrong or negligence by the employer." *Midland Valley R. Co. v. Fulgham*, 104 C. C. A. 151, 181 Fed. 91, L. R. A. 1917E 1; citing the following cases: *Chicago & N. W. R. Co. v. O'Brien*, 67 C. C. A. 421, 132 Fed. 593; *Northern Pac. R. Co. v. Dixon*, 71 C. C. A. 555, 139 Fed. 737; *Cryder v. Chicago, R. I. & P. R. Co.*, 81 C. C. A. 559, 152 Fed. 417.

63. **United States.** *Southern R. Co. v. Derr*, 153 C. C. A. 109, 240 Fed. 73; *Smith v. Pennsylvania R. Co.*, 151 C. C. A. 277, 239 Fed. 103, 15 N. C. C. A. 371; *Lucid v. E. I. Du Point de Nemours Powder Co.*, 118 C. C. A. 61 199, Fed. 377 L. R. A. 1917E 182; *Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co.*, 71 C. C. A. 316, 139 Fed. 528, 1 L. R. A. (N. S.) 533; *Westland v. Gold Coin Mines Co.*, 41 C. C. A. 193, 101 Fed. 59. **Iowa.** *Basham v. Chicago & G. W. Ry. Co.*, — Iowa —, 154 N. W. 1019.

**Kentucky.** *Louisville & N. R. Co. v. Allen's Adm'r*, 174 Ky. 736, 192 S. W. 863.

**Minnesota.** *Manning v. Chicago Great Western R. Co.*, 135 Minn. 229, 15 N. C. C. A. 591, 160 N. W. 787.

**Washington.** *Toler v. Northern Pac. R. Co.*, 94 Wash. 360, 162 Pac. 538.

64. **United States.** *Minneapolis & St. L. R. Co. v. Gotschall*, 244 U. S. 66 61 L. Ed. 995, 37 Sup. Ct. 598, 14 N. C. C. A. 865; *Southern R. Co. v. Derr*, 153 C. C. A. 109, 240 Fed. 73; *Smith v. Pennsylvania R. Co.*, 151 C. C. A. 277,



of the Iowa Supreme Court,<sup>65</sup> "this doctrine (*res ipsa loquitur*) would permit the mere fact of an accident to be deemed as *prima facie* evidence of negligence as the cause thereof. In this form the doctrine has not been

239 Fed. 103, 15 N. C. C. A. 371; *Midland Valley R. Co. v. Fulgham*, 104 C. C. A. 151, 181 Fed. 91, L. R. A. 1917E 1.

**Florida.** *Louisville & N. R. Co. v. Rhoda*. — Fla. —, 74 So. 19.

**Iowa.** *Hunt v. Chicago, B. & Q. R. Co.*, — Iowa —, 165 N. W. 105.

**Minnesota.** *Manning v. Chicago Great Western R. Co.*, 135 Minn. 229, 15 N. C. C. A. 591, 160 N. W. 787.

**New York.** *Tyndall v. New York Cent. & H. River R. Co.*, 157 N. Y. App. Div. 186, 141 N. Y. Supp. 879.

**North Carolina.** *Ridge v. Norfolk Southern R. Co.*, 167 N. C. 510, L. R. A. 1917E 215, 83 S. E. 762.

"It may be conceded at the outset that the *res ipsa loquitur* doctrine, strictly speaking, and confined strictly within the reasons calling for its application, does not prevail in controversies between master and servant. This is perhaps more particularly so as to its application by the federal courts. That doctrine is that negligence may be presumed or inferred from the mere happening of the accident, and that, although the burden is upon the plaintiff to establish negligence, still, in certain cases where it is applicable, proof of the accident is sufficient for that purpose and shifts the burden upon the defendant to explain away the *prima facie* case made by the pre-

sumption. The reason why the rule embodied in the maxim is most generally held not to apply as between master and servant is that the mere happening of the accident does not indicate whether it resulted from any of causes for which the master would be liable or from some cause that the servant assumed or for which he was responsible. The modern tendency, however, is that even as between master and servant, were the thing which caused the injury is shown to be under the management or control of defendant or its servants other than the one injured, and the accident is such as, in the ordinary course of things, does not happen if those who have the management or control use proper care, slight circumstances pointing toward negligence on behalf of the defendant will authorize a submission of the question of its negligence to the jury. In other words, where the evidence shows that the accident is necessarily the result of defective conditions and can be explained upon no other reasonable hypothesis, circumstances indicating carelessness on the part of defendant will produce such a condition as to authorize the submission of the case to the jury." *Louisville & N. R. Co. v. Allen's Adm'r*, 174 Ky. 736, 192 S. W. 863.

65. *Hunt v. Chicago, B. & Q. R. Co.*, — Iowa —, 165 N. W. 105.

avored by the courts, and its application has been confined to a very limited field; its most common and prominent application being in favor of a passenger against a common carrier. See *Case v. Railway Co.*, 64 Iowa, 762, 21 N. W. 30; *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918; *Kuhns v. Railway Co.*, 70 Iowa, 565, 31 N. W. 868; *O'Connor v. Railway Co.*, 83 Iowa, 105, 48 N. W. 1002; *Haden v. Railway Co.*, 99 Iowa, 735, 48 N. W. 733; *Brownfield v. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038. In this form it has not been deemed applicable to master and servant cases. But there has been quite uniform tendency in the courts to give recognition to the doctrine in a qualified form and to extend its applicability accordingly. *Marceau v. Railway Co.*, 211 N. Y. 203, 105 N. E. 207, 51 L. R. A. (N. S.) 1221, Ann. Cas. 1915C, 511. The doctrine in such qualified form is, not that the mere fact of an accident is of itself evidence of negligence as a cause thereof, but that the nature of an accident in manner and circumstance may be such as to indicate negligence as a cause thereof; that is to say, that the circumstances of an accident may be of such a nature as to constitute circumstantial evidence tending to show negligence. Some accidents, therefore, may be of such a nature as to render the doctrine applicable, while other accidents may be of such a nature as to render it inapplicable. In considering this question, it must be borne in mind that it is not the fact of injury of a plaintiff which gives rise to the application of the doctrine but it is the accidental event from which the injury resulted. *Fitch v. Traction Co.*, 124 Iowa, 668, 100 N. W. 618; *Cahill v. I. C. Ry. Co.*, 148 Iowa, 241, 125 N. W. 331, 28 L. R. A. (N. S.) 1121; *Thomas v. Railway Co.*, 193 Mass. 438, 79 N. E. 749; *Wyatt v. Railway Co.*, 156 Cal. 170, 103 Pac. 892; *Levin v. Railway Co.*, 228 Pa. 266, 77 Atl. 456; *Eisentrager v. Great Northern*, 160 N. W. 311, L. R. A. 1917B, 1245. Where an accident is in its nature and circumstances separable in identity from the injury of a complaining plaintiff, it is these circumstances that are looked to, to determine the applicability of the doctrine in question. The derailment

of a train; a collision of trains; an overturned coach; a broken bridge—these are illustrative of accidents which are often attended with circumstances indicating their cause, and which would be deemed as accidents, even though they had not resulted in injury to the particular plaintiff. If the circumstances disclosed are not such as tend to indicate negligence, then they cannot be deemed to speak. If they do tend to indicate negligence, they do speak as circumstances only, and to that extent the doctrine becomes applicable. When thus applicable, we see no reason why it may not be applicable in master and servant cases within appropriate limits. This is especially so in cases where the defenses of contributory negligence and the fellow servant rule are abrogated. But it is also true that the scope of its operation must ordinarily be narrower in master and servant cases than in cases between common carrier and passenger, because the mutual obligations between master and servant are by no means identical with those that obtain between carrier and passenger.”

**§ 545. Recovery Cannot be Defeated When Defendant's Negligence is Part of Causation.** While a carrier is not liable under the federal act when its negligent act is no part of the causation, it is liable in damages for an injury resulting in whole or in part from its negligence.<sup>66</sup> If the injury was caused in whole or in

66. **United States.** *Union Pac. R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. —, 38 Sup. Ct. 318, Aff'g 99 Neb. 349, 156 N. W. 765; *Great Northern R. Co. v. Knapp*, 240 U. S. 464, 60 L. Ed. 745, 36 Sup. Ct. 399; *Southern R. Co. v. Maryland*, 152 C. C. A. 91, 239 Fed. 41; *Philadelphia & R. R. Co. v. Maryland*, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; *St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman*, 150 C. C. A. 203, 237 Fed. 1; *Pennsylvania Co. v.*

*Cole*, 131 C. C. A. 214, 214 Fed. 948; *Smith v. Atlantic Coast Line R. Co.*, 127 C. C. A. 311, 210 Fed. 761.

**Alabama.** *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

**Arkansas.** *Lusk v. Osborn*, 127 Ark. 170, 191 S. W. 944.

**Iowa.** *Carrigan v. Union Pac. R. Co.*, — Iowa —, 162 N. W. 571.

**Georgia.** *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620; *Charleston & W. C. R. Co.*

part from the company's negligence, the statute cannot be nullified and the right of recovery defeated by calling a plaintiff's act the proximate cause of the injury.<sup>67</sup>

*v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275.

**Kansas.** *Pyles v. Atchison, T. & S. F. R. Co.*, 97 Kan. 455, 155 Pac. 788; *Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421.

**Kentucky.** *Lexington & E. R. Co. v. Smith's Adm'e*, 172 Key. 117, 188 S. W. 1091.

**Maryland.** *Baltimore & O. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225.

**Michigan.** *Chapman v. United States Exp. Co.*, 192 Mich. 654, 159 N. W. 308; *Holmberg v. Lake Shore & M. S. R. Co.*, 188 Mich. 605, 155 N. W. 504.

**Missouri.** *Brightwell v. Lusk*, 194 Mo. App. 643, 189 S. W. 413; *Koukouris v. Union Pac. R. Co.*, 193 Mo. App. 495, 186 S. W. 545; *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771.

**Montana.** *Sorenson v. Northern Pac. R. Co.*, 53 Mont. 268, 163 Pac. 560.

**Nebraska.** *Hadley v. Union Pac. R. Co.*, 99 Neb. 349, 156 N. W. 765.

**New York.** *McAuliffe v. New York Cent. & H. River R. Co.*, 172 N. Y. App. Div. 597, 158 N. Y. Sup. 922.

**North Dakota.** *Manson v. Great Northern R. Co.*, 31 N. D. 643, 155 N. W. 32.

**South Dakota.** *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

**Vermont.** *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925.

**Virginia.** *Going's Adm'x v. Norfolk & W. R. Co.*, 119 Va. 543, 89 S. E. 914.

**Washington.** *Papoutsikis v. Spokane, P. & S. R. Co.*, 89 Wash. 1, 153 Pac. 1053.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060.

**Wisconsin.** *Molzoff v. Chicago, M. & St. P. R. Co.*, 162 Wis. 451, 11 N. C. C. A. 273, 156 N. W. 467.

Under the federal act the defendant is liable in damages to the plaintiff for an injury if caused in whole or in part by the defendant's negligence. The defendant can escape liability only in case where there is no negligence whatever on its part causing or contributing to the employee's injury. *Going's Adm'x v. Norfolk & N. Ry. Co.*, *supra*.

67. *Spokane & E. I. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518; *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887; *Grand Trunk Western R. Co. v. Lindsay*, 120 C. C. A. 166, 201 Fed. 836; s. c. 233 U. S. 42, 58 L. Ed. 833, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.

"If under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by



This principle was well explained by the federal Supreme Court in *Illinois Cent. R. Co. v. Skaggs*,<sup>68</sup> wherein a recovery by a brakeman injured when an engine, being moved in response to his signal, "side-swiped" a car on an adjoining track, was affirmed. "It is contended," said the court, "that the state court erred in permitting a recovery under the Federal statute for the reason that the injury resulted from Skaggs' own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents or employees of the employing carrier or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. April 22, 1908, 35 Stat. 65. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such em-

calling his act contributory negligence. For his act was the same act, by whatever name it be called. It was only when plaintiff's act is the sole cause—when defendant's act is no part of the causa-

tion—that defendant is free from liability under the act." *Grand Trunk Western R. Co. v. Lindsay*, *supra*.

68. 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249.

ploye.' See Second Employers' Liability Cases, 223 U. S. 1, 49, 50; Seaboard Air Line v. Tilghman, 237 U. S. 499, 501. We think that the argument for the plaintiff in error overlooks the inferences of fact which the jury was entitled to draw. Thus, the jury could properly regard the two brakemen as assisting each other in the movement in question. Such assistance was certainly appropriate, if not absolutely necessary. The very purpose of having two brakeman was not to put upon either the entire responsibility. Working together under the exigencies of such operations, particularly when conducted in the night time, it was manifestly contemplated that the one brakeman would supplement the other and not be compelled at the peril of his rights personally to examine what the other did or the basis of the reports the other gave. Each had a reasonable latitude in relying upon the statements of the other made in the course of the operation and as a part of it. The Supreme Court of the State said: 'It was a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto.' In this we find no error. When the engine was uncoupled, Skaggs was on the right-hand side, while Buchta was on the other side, —the side of the passing track—a better place to judge the clearance. The fact that Skaggs asked his question is itself not without significance. These questions indicated doubt on Skaggs' part, while Buchta's reply showed certainty on his. It was plainly permissible to infer from the testimony that the two men were not in positions of equal advantage, and Skaggs was entitled to the exercise of reasonable care on the part of Buchta in observing and reporting the position of the cars. As there was evidence upon which it could be found that Buchta was negligent, and that thereby injury resulted to Skaggs, it cannot be said that the recovery in this aspect of the case was contrary to the statute."

**§ 546. Casualties Due to Sole Negligence of Employee, No Recovery under Federal Act.** If the sole cause of an employee's injury or death is his own act whether negligent or not, there can be no recovery under the federal act.<sup>69</sup> For instance, a recovery was denied upon this principle under the following facts: deceased, a flagman,

69. **United States.** *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Illinois Cent. R. Co. v. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C, 168; *Southern Ry. Co. v. Mays*, 152 C. C. A. 91, 239 Fed. 41; *Philadelphia & R. R. Co. v. Marland*, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; *Virginian R. Co. v. Linkous*, 148 C. C. A. 543, 235 Fed. 49; *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 88.

**Alabama.** *Southern R. Co. v. Peters*, 193 Ala. 94, 69 So. 611.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Stewart*, 124 Ark. 437, 187 S. W. 920.

**Georgia.** *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275.

**Iowa.** *Dodge v. Chicago Great Western R. Co.*, 164 Iowa 627, 146 N. W. 14.

**Kentucky.** *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786; *Kentucky & T. R. Co. v. Minton*, 167 Ky. 516, 180 S. W. 831; *Cincinnati, N. O. & T. P. R. Co. v. Swann's Adm'x*, 160 Ky. 458, L. R. A. 1915C 27, 169 S. W. 886; *Ellis's Adm'r v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512.

**Louisiana.** *Absheir v. Louisiana Ry. & Nav. Co.* 141 La. 194, 74 So. 901.

**Maryland.** *Baltimore & O. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225.

**Massachusetts.** *Gillis v. New York, N. H. & H. R. Co.*, 224 Mass. 541, 113 N. E. 212.

**Missouri.** *Winslow v. Missouri, K. & T. Ry. Co.* (Mo. App.), 192 S. W. 121; *Delano v. Roberts*, — Mo. App. —, 182 S. W. 771; *Trowbridge v. Kansas City & W. B. Ry.* 192 Mo. App. 52, 179 S. W. 777.

**Montana.** *Sorenson v. Northern Pac. R. Co.*, 53 Mont. 268, 163 Pac. 560.

**New Hampshire.** *Wilson v. Grand Trunk Ry. Co.*, — N. H. —, 97 Atl. 981.

**North Carolina.** *Hinson v. Atlanta & C. Air Line R. Co.*, 172 N. C. 646, 90 S. E. 772.

**South Dakota.** *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

**Virginia.** *Virginia & S. W. R. Co. v. Hill*, 119 Va. 837, 89 S. E. 895; *Virginian Ry. Co. v. Andrews' Adm'x* 118 Va. 482, 87 S. E. 577.

**Washington.** *Bjornsen v. Northern Pac. R. Co.*, 84 Wash. 220, 146 Pac. 575.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060; *Easter v. Virginian R. Co.*, 76 W.

was sent by a bridge foreman a certain distance on the track from a bridge on which repairs were being made, to protect the bridge crew by "flagging" all passing trains. While on duty he was struck and killed by a train approaching from the direction of the bridge. In an action for damages under the federal act, it was claimed that his death was due in part to the negligence of the employees in charge of the train in failing to keep a lookout and to give a reasonable warning of the approach of the train; but the court held that the defendant did not owe the decedent the duty of keeping a lookout for him and as there was no evidence that the train operatives actually saw him in a position of peril in time to have, by exercising ordinary care, prevented his death, a verdict of the jury for defendant was approved. In the course of the opinion, the court said: "When a flagman is sent out to watch for train and warn them of danger, the company and its trainmen have a right to presume that he will not only watch for trains but also for his own safety and his failure to do this is his own negligence" and "if one's death is caused solely by his own negligence, he cannot recover under either the state law or the Federal Employers' Liability Act."<sup>70</sup> In another case under the federal act the Kansas City Court of Appeals held that there was no liability for the death of a brakeman who, having signaled the engineer to slow down the speed of a backing train on a curve at night voluntarily placed himself in a place of danger between the moving cars and a freight loading platform where he could not signal the engineer and could not have been seen by him because of the curve, and was crushed to death between the platform and a side of a moving car as he was attempting to vault onto the plat-

Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

The right of recovery under the federal act depends upon negligence for which the carrier is made liable, and if deceased's death was the result of a mere

accident, or was due solely to his own negligence, there can be no recovery. *Culp v. Virginian R. Co.*, 77 W. Va. 125, 87 S. E. 187.

70. *Ellis's Adm'r v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512.



form. There was a safe place for the decedent to stand on the opposite side of the track where there was no obstruction. Discussing the legal effect of these facts, Judge Trimble, for the court, said: "Under the (Federal) Employers' Liability Act, if there was negligence on the part of the defendant, contributory negligence of the deceased does not bar a recovery but only diminishes the damages in proportion to the amount of negligence attributable to such employe. Where, however, there is no negligence on the part of the master, but the injury is solely the result of the employe's negligence, there can be no recovery. That such is the case here we think there can be no doubt. Pankey gave the slow signal and then went from a place of safety, and, without notice or intimation to anyone, placed himself in an exceedingly dangerous situation. He was not required to do this in the performance of his work. And, when the danger of his situation evoked a warning from his conductor, he voluntarily chose a dangerous instead of an easier and a surely safe way out. This last was in itself negligence".<sup>71</sup>

**§ 547. Foregoing Principle Further Illustrated and Applied.** It is not the purpose of the statute to afford relief where one's injury is due solely to his own reckless and indifferent conduct.<sup>72</sup> In the cited case it appeared that an engineer ran his train beyond a station at which he had been ordered to meet another train and a collision followed. The engineer disregarded the dispatcher's orders for the meeting point apparently with the full knowledge of the other members of the crew as the conductor and the head brakeman were riding on the engine, and copies of the train orders as to the meeting point were found on the persons of the engineer and the conductor when their bodies were removed from the wreck. Said the Court: "It is insisted by counsel for plaintiff in the case at bar that

71. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.

72. *Virginian R. Co. v. Linkous*, 144 C. C. A. 386, 230 Fed. 88.

plaintiff's decedent lost his life 'as a result of a combined mutual, concurring, and joint failure of these four men to fulfill their primary duty by executing the order to meet No. 33 according to its terms and as prescribed by the defendant's rules, which was the controlling and proximate cause of the collision.' \* \* \* While the Employers' Liability Act was manifestly intended to modify the law as it formerly existed so as to materially benefit those who might be injured in the future, by abolishing the harsh rule known as the 'Fellow-Servant Doctrine,' yet it cannot be reasonably insisted that it was the purpose of the act to afford relief where one's injury is due solely to his own reckless and indifferent conduct. After an exhaustive examination of the authorities cited we find nothing to suppose the contentions of the plaintiff. Under the circumstances the jury could not reasonably have drawn any other inference than that the other employes were not in any degree primarily responsible for the accident. Such being the case, we are of opinion that the jury was not warranted in reaching the conclusion that plaintiff's decedent's death resulting in whole or in part from the negligence of the employes of the defendant."

§ 548. **Cases Under Federal Act in Which the Facts were Held to Show Actionable Negligence.** In the following actions for damages under the federal act it was held that the facts summarized warranted an inference of negligence sufficient to submit the question to a jury. A railroad bridge which had been weakened because some of the wooden supports under it had been consumed by fire collapsed when an engine attached to a rotary snow plow passed over it, causing the death of the engineer. The defendant's negligence was held to be a jury question.<sup>73</sup> Decedent, a switchman in the employ of a railroad company while engaged in making up an interstate train, was run over and killed by a "road"

73. *Copper River & N. W. R. Co. v. Reed*, 128 C. C. A. 39, 211 Fed. 111.

engine used at the time in switching. This engine was equipped with a pilot and did not have a front footboard with which regular switch engines in railroad yards are usually equipped. Decedent fell from the pilot of the "road" engine and the evidence disclosed that there would have been less danger for employees if the engine had been equipped with a footboard. The court held that it was a question for the jury to determine whether the railroad company was negligent in using the "road" engine instead of a regular switch engine.<sup>74</sup> A conductor of a freight train was killed in a rear-end collision. One of the brakemen working under him neglected to protect the rear of the train by going back a certain distance to flag approaching trains as he was required to do. It was held that the brakeman's negligence, as a matter of law, was the defendant's negligence.<sup>75</sup> A gang of track laborers were returning from their work on several hand-cars which were a short distance apart. One of these cars on which plaintiff was riding collided with the car just ahead of it, causing plaintiff's injuries. It was shown that the men on the car in front of plaintiff's car without any warning suddenly materially reduced the speed of their car and the collision followed. The court held that the question whether the defendant's employees on the first car were negligent was properly a question for the jury.<sup>76</sup> Whether a railroad company was negligent in failing to inspect a box car after the roof was blown off and before the said condition of the box car caused an injury to an employee, was properly submitted to a jury for determination.<sup>77</sup> Plaintiff was assisting in repairing a railroad bridge by preparing the points and heads of pilings so that they might be driven with a pile-driver. He attached a rope to a pile so that it might be hoisted by the pile-driver and moved into the place

74. *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321.

75. *Pennsylvania R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

76. *San Pedro, L. A. & S. L. R. Co. v. David*, 127 C. C. A. 454, 210 Fed. 870.

77. *Ridge v. Norfolk Southern R. Co.*, 167 N. C. 510, L. R. A. 1915E 215, 83 S. E. 762

where it was to be driven. Plaintiff then crossed to the other side of the track when the pile, it being raised, swung over and struck him. There was evidence tending to show that if the engineer operating the pile-driver engine had held the line as it was his duty to do, the piling would have swung across from one side of the track to the other high enough to avoid hitting the plaintiff. The question of the engineer's negligence was properly submitted to the jury.<sup>78</sup> A section hand, while sweeping snow from the switches of a main line on a cold, windy, dark night, was struck and killed by a train running at a speed of 35 miles an hour without the bell ringing or whistling except that the whistle was blown at the whistling post before reaching the station. The track at the point was straight and the engine had a headlight which would show objects for a distance of 1,000 feet. The men in charge of the train knew that on such nights section men worked at switches to keep them clear of snow. The court held that on the question of the defendant's negligence the cause was properly submitted to the jury.<sup>79</sup> A large number of boxes had been standing for several weeks on a platform within a foot of a passing car. A passenger train passed by this platform and the steps attached to the side of the baggage car were torn away by striking some of these boxes which had toppled over a few hours before. Shortly thereafter the baggageman on the train as it approached another station, fell to the ground because of the absence of the steps. In leaving the boxes unsecured so that they might cause damage to a passing train, the court held that the defendant was guilty of actionable negligence under the federal act.<sup>80</sup> A passenger train stopped at night on a trestle bridge which was floored on one side of the track but not on the other. The train porter on the command of the conductor who knew the condition of the trestle, stepped from the train on the side

78. *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 5 N. C. C. A. 947, 140 Pac. 685.

79. *Hardwick v. Wabash R. Co.*,

181 Mo. App. 156, 168 S. W. 328.

80. *Ferebee v. Norfolk Southern R. Co.*, 163 N. C. 351, 52 L. R. A. (N. S.) 1114, 79 S. E. 685.



that was not floored, fell several feet to the ground and was injured. He had been ordered by the conductor to get off the train in order to carry an oil can to the engineer. The porter was ignorant of the condition of the bridge. The court held that the conductor as the agent of the defendant was negligent in failing to inform the porter as to the proper side of the bridge for him to alight and that said negligence, under the federal act, was the proximate cause of the injury.<sup>81</sup> A petition in an action under the federal act stated that the plaintiff was a fireman on an interstate train; that as the train approached close to a place where the track had been torn up for repairs, a flagman, one of the laborers on the track, ran excitedly towards the train and signaled the engineer to stop. The emergency brakes were quickly applied and the plaintiff, seeing the flagman and the track torn up, jumped from the engine and was injured. It was alleged that the plaintiff's injuries were caused by the negligence of the defendant in failing to have a flagman a sufficient distance away from where the employes were working on the track so that the train could be stopped before reaching the point. The petition was held to state a good cause of action under the federal act.<sup>82</sup> A bridge carpenter was at work on a double track bridge within fifty feet of a curved tunnel on the west and on the east approach there was another curve in a cut. The foreman took no precaution to protect the workmen by sending out flagmen. He only stood on the east bound track and called "railroad" or "clean up" on observing the approach of a train. It was held that the company was guilty of negligence under the federal act in failing to protect the bridge carpenters with flags.<sup>83</sup> Whether a railroad company was negligent in

81. *Missouri, K. & T. Ry. Co. of Texas v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937.

82. *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932.

83. *Norfolk & W. R. Co. v. Holbrook*, 131 C. C. A. 621, 215 Fed. 687; s. c., 131 C. C. A. 666, 215 Fed. 1007 rev'd on other grounds by United States Supreme Court 235 U. S. 625, 59 L. Ed. 392, 35 Sup. Ct. 143, 7 N. C. C. A. 814.

failing to illuminate and guard an opening in a platform tunnel, was held, in an action under the federal act, under the evidence to be a question for the jury.<sup>84</sup> A switchman, while walking along a track in a terminal railroad yard at night, was struck and killed by an engine moving slowly and almost noiselessly in the same direction. The engine's headlight was very dim and a train on another track nearby was passing at the same time making considerable noise. The engine which struck the switchman could have been stopped within a few feet but the engineer did not see the decedent. It was held that these facts constituted sufficient evidence of negligence and a verdict for the plaintiff was affirmed.<sup>85</sup> Whether a cinder pile placed near a track in a railroad yard constituted a "defect due to negligence" within the meaning of the federal act, was a question for the jury to pass upon.<sup>86</sup> A railroad employe, while riding on the side of a box car at night, struck a switch stand and was injured. In a subsequent action for damages under the federal act, the court held that the question of the defendant's negligence in maintaining the switch stand too close to the track was, under the evidence, a matter for the jury to determine.<sup>87</sup> An engineer in stopping a train and causing such an unusual and sudden jolt as to throw an employe from a ladder on a side of a car was guilty of negligence under the federal act.<sup>88</sup> When a railroad company caused some cars to be "kicked" at night without warning and without light along a track in a terminal yard, its negligence in so doing was a jury question.<sup>89</sup> A brakeman,

84. *Copper River & N. W. R. Co. v. Heney*, 128 C. C. A. 131, 211 Fed. 459.

85. *Southern R. Co. v. Smith*, 123 C. C. A. 488, 205 Fed. 360.

86. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.

87. *McDonald v. Railway Transfer Co. of Minneapolis*, 121 Minn. 273, 141 N. W. 177.

88. *Owens v. Chicago, G. W. R. Co.*, 113 Minn. 49, 128 N. W. 1011; *La Mere v. Railway Transfer Co.* 125 Minn. 526, 147 N. W. 1134; *Vaughan v. St. Louis & S. F. R. Co.*, 177 Mo. App. 155, 164 S. W. 144. *Forth Worth & D. C. Ry. Co. v. Stalcup*, — Tex. Civ. App. —, 167 S. W. 279.

89. *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832; s.

while switching cars from a train to a side track at night and riding on the side of a box car, was struck and injured by other cars standing on the adjoining track which had not been shoved far enough from the switch to be "in the clear." The brakeman knew of the presence of the standing cars but did not know how far they had been placed from the switch joining the two tracks. He proceeded to investigate before making the switching movement but before ascertaining the condition of the cars he was assured by a fellow brakeman that the standing cars could be passed with safety and relying upon this assurance, he proceeded with the switching movement and was injured by coming in contact with the cars. In an action under the federal act it was held that his fellow brakeman's statement constituted actionable negligence.<sup>90</sup> A switchman while assisting in "poling" a car, was crushed to death between the engine and the car. There was evidence pro and con as to the proper method in such movement of cars. Whether the method actually used by direction of the foreman was negligent and caused the death of the decedent, was held, under the evidence, to be a jury question.<sup>91</sup> A track laborer taking out old ties from the main line when a train approached on that track, stepped on an adjoining track where he was struck and killed by a switch engine which approached without any warning. Witnesses testified that it was customary for switching crews to give warning to track laborers. It was held that the question of the negligence of the employes in charge of the switch engine was properly submitted to the jury.<sup>92</sup> A glass attached to a lubricator on an engine exploded and blew the shield around it against an engineer's face causing the loss of an eye. The lubricator in question was a kind called "Nathan" which sometimes explodes. Seventy-five per cent of the

C. 113 C. C. A. 379, 192 Fed. 901.

90. *Skaggs v. Illinois Cent. R. Co.*, 124 Minn. 503, 145 N. W. 381.

91. *Sweet v. Chicago & N. W.*

*R. Co.*, 157 Wis. 400, 147 N. W. 1054.

92. *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385.

defendant's engines were equipped with a kind of lubricator known as "Bull's Eye" which did not explode. The "Nathan" lubricators had been in use for twenty years but for three years before the date of plaintiff's injury this kind had been replaced on most of the engines by the "Bull's Eye" lubricators. Whether the defendant committed a negligent act in continuing to furnish the engine on which plaintiff was working with a "Nathan" lubricator instead of a "Bull's Eye," was a question for the jury.<sup>93</sup> A car foreman while on duty had the exclusive possession of certain keys which unlocked the switches of a certain repair track in a terminal yard. Decedent, a car repairer, while working on this track was ordered by the foreman to go to another track in the yard to make slight repairs to a car. While he was absent the foreman ordered the switching crew to take out some cars from the repair track and place others in there for repair. Having no knowledge of the foreman's order or that cars were being switched onto the repair track, the car repairer returned and while at work on a car standing on the repair track, the car was struck by other cars shoved in on the repair track by the switching crew causing the death of the car repairer. It was held that whether the foreman was negligent in failing to anticipate that the car repairer would return before the switching was completed and in failing to warn the decedent, was not a question of law but a question of fact to be solved by the jury.<sup>94</sup> A railroad employe was ordered by the conductor to couple an engine to a way car. Upon the first effort, the coupling failed. The way car was knocked back some distance. The deceased stepped in to fix the pins and then signaled the fireman to couple up, but the caboose again failed to make the coupling. The deceased again stepped in to adjust the coupling and while standing near the draw bar the caboose suddenly moved down upon him, causing his death. It was held that the evidence was sufficient

93. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145.

94. *Evans v. Detroit, G. H. & M. R. Co.*, 181 Mich. 413, 148 N. W. 490.



to show a violation of the Federal Safety Appliance Act and that such violation caused his death.<sup>95</sup> Decedent, a car inspector, was run over and killed at night on a track in a railroad terminal yard by some cars backed up by a switch engine without warning, without lights and with no one on the end of the first car to warn him of danger. In an action under the federal act it was held that the question of the defendant's negligence was properly submitted to the jury.<sup>96</sup> A section laborer in a railroad yard stepped on a certain track for purposes of his own, the evidence being conflicting as to whether he was between two cars or at the end of a car standing on the track. While so standing he was trucked by some cars switched upon the track. There was evidence that there was no one on these cars in a suitable position to warn employes of their approach and there was also evidence that the section foreman knew that the laborer was in a position of danger on the track and that he by exercising ordinary care could have seen the approaching cars in time to have warned the decedent. It was held under these facts that the cause was properly submitted to the jury under the federal act.<sup>97</sup>

§ 549. **Cases Under Federal Act in Which the Facts were Held not to Show Actionable Negligence.** An electric passenger car while running from one state to another was derailed in the state of Ohio causing the death of the motorman. Under a statute of Ohio proof of a defect in the wheels of the car was sufficient to create a *prima facie* case of negligence but as the action was prosecuted under the federal act the state statute was inoperative for the reason that under the federal act a common carrier by railroad is not liable unless the death is the result of defects "due to negligence" and a recovery was denied.<sup>98</sup> An engine repairer

95. *Montgomery v. Carolina & N. W. R. Co.*, 163 N. C. 597, 80 S. E. 83.

96. *Thornton v. Seaboard Air Line Ry.*, 98 S. C. 348, 82 S. E. 433.

97. *Louisville & N. R. Co. v. Johnson's Adm'x*, 161 Ky. 824, 171 S. W. 847.

98. *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340, 155 S. W. 742.

in a roundhouse had his hand crushed between a pilot beam and a jack while attempting to lower the front end of a locomotive engine. He claimed that the engine dropped because another jack on the other side of the engine slipped and that this in turn was due to the fact that a wrench was used as a substitute for a lever. The court held that, under the evidence, the plaintiff failed to show that an act of negligence caused the injury.<sup>99</sup> A fireman on an engine saw a track walker walking in a place of safety between two tracks with his back to the train. The engine bell was ringing; but as the train came close to the track walker, he suddenly stepped from between the tracks on the track on which the train was approaching and was run over and killed. He could not have been seen by the engineer because of a curve. A jury returned a verdict against the railroad company and found that the death of the track walker was due in part to the negligence of the fireman in failing to request the engineer to sound the whistle when the decedent was first seen by the fireman while walking between the tracks. It was held that the fireman was not negligent in failing to anticipate that the decedent would step from a place of safety on a track directly in front of an approaching train and the cause was reversed.<sup>1</sup> Plaintiff, a student fireman, was given a letter by the defendant railroad company permitting him to ride on the engines of all freight trains to prepare himself for the duties of a fireman. He boarded an engine of one train and was informed by the fireman that it was not a suitable train to learn firing on and he was advised to get off and then get on another train running in the opposite direction at a certain place over which all trains ran under "slow orders." He was told that the train would pass that place running only six miles an hour and that he could easily get on. The plaintiff did so and in attempting to get on the other train was

99. *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260, 148 N. W. 106.

1. *New York, N. H. & H. R. Co. v. Pontillo*, 128 C. C. A. 573, 211 Fed. 331.

thrown under the wheels and injured. He attributed his injuries to the excessive speed of the train of which he had no knowledge, but assumed, on the assurance of the fireman of the other train, that it was only running at the rate of six miles per hour. He had had no experience in judging the speed of trains. The court held that there was no duty towards the plaintiff to run the train at six miles an hour and consequently no negligence.<sup>2</sup> Plaintiff, a section foreman, was riding with a force of men on a handcar while inspecting the tracks. A flagman had preceded the section hands along the track so as to give them warnings of approaching trains. Suddenly a freight train running at a high rate of speed came in sight from around a curve and the flagman promptly warned the men on the handcar. Because of the close proximity of the train when it was discovered, owing to the curve which obstructed the view, the men on the handcar acted promptly, and to prevent a threatened collision quickly removed the car. The plaintiff in assisting strained himself and sustained injuries. The court found that under the facts neither the flagman or the train employes were negligent and that as it was necessary for the plaintiff in an action under the federal act to show by the evidence that his injuries were caused in whole or in part by the defendant's negligence or its employes, there was no liability.<sup>3</sup> Two section men, each holding one end of a tie, started to toss the tie on a flat car. The tie was in a wet, slippery condition and this caused it to turn as it was being tossed on the car. One of the two laborers, by reason of the tie slipping and turning, had his finger caught between the tie and the floor of the car, causing it to be pinched off. In a subsequent action under the federal act, it was held that the facts disclosed did not show negligence within the meaning of the act, but that the plaintiff's injury was due to an accident without any causal negligence

2. Cincinnati, N. O. & T. P. R. Co. v. Wheeler, 160 Ky. 215, 169 S. W. 690.

3. Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S. E. 558.

contributing.<sup>4</sup> Steam escaped from a steam pipe attached to a steam chest on a ferry boat used by a railroad company as a part of its line. The escaping steam caused the death of an employe on the boat and it was held in an action for his death by the administrator on behalf of the beneficiaries named in the federal act that as there was no evidence produced tending to show that the escape of the steam and the breaking of the pipe was due to some negligence on the part of the owner, there could be no recovery.<sup>5</sup> A brakeman while switching cars at night and knowing that cars were being shoved back in response to his signal to the engineer, placed himself between the track on which the cars were approaching and a freight loading platform where the space between the platform and a car was only a few inches and too narrow for a man to stand with safety. While the cars were still about twenty feet away from him, the conductor warned him of the dangerous place he was in and told him to get out. Then the brakeman set his lantern on the platform, placed his hands upon the platform and tried to vault onto the platform but before he succeeded the end of the car caught him and crushed him between the car and the platform. It was held that no negligence of the defendant contributed either in whole or in part to cause the death.<sup>6</sup> A conductor was walking along the side of his train taking the numbers of the cars while the crew was making up the train. Starting at the rear of the train there were first, three cars; second, a space of 18 or 20 feet; third, three more cars; fourth, a space of several feet, and, fifth, a long string of freight cars with the engine at their head. When the conductor reached the rear of the forward three cars, he gave the lift pin lever a jerk, and then reached in to put his hand on, or actually took hold of the coupler when the forward end

4. *Long v. Southern R. Co.* in Kentucky, 155 Ky. 286, 159 S. W. 779.

5. *The Passaic*, 190 Fed. 644;

s. c., 122 C. C. A. 466, 204 Fed. 266.

6. *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.



of the train struck the forward end of the three cars in the act of coupling to them, knocked him down and ran over him. The car to which the coupler was attached had been inspected shortly before the accident and the inspectors had found no defect. Several witnesses examined and operated the coupler and the lift pin lever immediately after the accident and found them in good condition and operating perfectly. It was held that under this state of facts the verdict of the jury that the coupler was so defective at the time of the accident that "it would not couple automatically by impact without the necessity of men going in between the car" as required by the Federal Safety Appliance Act, was based on conjecture and could not be sustained.<sup>7</sup> A section hand was riding on a tricycle on a railroad track with his foreman. Tools were also being carried. The foreman ordered the laborer to stop the car with the brake and when he attempted to do this with his hand, his arm came in contact with the tools on the car causing his fingers, in some way not clearly shown, to be caught in the cog wheels, injuring him. It was claimed in a suit under the federal act that the foreman was negligent in ordering the laborer to apply the brakes as in doing so he might probably come in contact with the tools and be injured. The court held that such an act on the part of a foreman was not negligence and that the injury was caused by an accident without any negligence contributing thereto.<sup>8</sup>

**§ 550. Statute Covers Acts of Interstate Employes and Defects in Instrumentalities Used Solely in Intra-state Commerce.** It is not essential, to permit a recovery under the national act, that the employe whose negligence caused the injury be also employed in interstate commerce or that the instrumentality, the defect in which caused the injury, be used at the time in interstate

7. *Midland Valley R. Co. v. Fulgham*, 104 C. C. A. 151, 181 Fed. 91, L. R. A. 1917E 1 rev'g. 167 Fed. 660.

8. *Cincinnati, N. O. & T. P. R. Co. v. Hill* 161 Ky. 237, 170 S. W. 599.

commerce.<sup>9</sup> Instances where the causal negligence is that of a co-employee engaged at the time solely in intrastate commerce or where the instrumentality causing the injury was used at the time exclusively in intrastate commerce, are embraced within the terms of the act, if the other conditions are present, that is, if the carrier was engaged in interstate commerce and if the injured employee at the time was employed in interstate commerce.<sup>10</sup> The statute gives a right of recovery under such conditions for injury or death resulting from the negligence of any of the employees.<sup>11</sup> In the Pedersen case, cited in the notes, the court said "But it is not essential, where the causal negligence is that of a co-employee, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence 'of any of the

9. **United States.** *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875; 38 L. R. A. (N. S.) 44; *Lamphere v. Oregon R. & Nav. Co.*, 116 C. C. A. 156, 196 Fed. 336, 47 L. R. A. (N. S.) 1; *Central R. Co. of New Jersey v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901; *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832; *Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893.

**California.** *Southern Pac. Co. v. Industrial Acc. Commission of California*, 174 Calif. 8, 161 Pac. 1139.

**Indiana.** *Pittsburgh, C., C. & St. L. R. Co. v. Farmers' Trust & Savings Co.*, 183 Ind. 287, 108 N. E. 108.

**Kentucky.** *Louisville & N. R. Co. v. Walker's Adm'r*, 162 Ky. 209, 172 S. W. 517.

**Minnesota.** *Crandall v. Chicago Great Western R. Co.*, 127 Minn. 498, 150 N. W. 165.

**New Jersey.** *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764.

**North Carolina.** *Sears v. Atlantic Coast Line R. Co.*, 169 N. C. 446, 86 S. E. 176.

Contra: *Illinois Cent. R. Co. v. Rogers*, 136 C. C. A. 530, 221 Fed. 52; *Mayers v. Union R. Co.*, 256 Pa. 474, 100 Atl. 967.

10. *Southern Pac. Co. v. Industrial Acc. Commission of California*, 174 Cal. 8, 161 Pac. 1139; *Pittsburgh, C., C. & St. L. R. Co. v. Farmers' Trust & Savings Co.*, 183 Ind. 287, 108 N. E. 108.

11. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153; *Mondou v. New York, N. H. & H. R. Co.*, *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832, aff'd in 113 C. C. A. 379, 192 Fed. 901.

employees of such carrier,' and this includes an employe engaged in intrastate commerce." An appellate court in New Jersey rendered an erroneous decision on the question of applicability of the federal act which was due in part to a failure to recognize this principle.<sup>12</sup> In that case the plaintiff was injured while placing a cover over the mechanism of a switch which he had just oiled. The switch connected with tracks used indiscriminately in moving both kinds of commerce. While so engaged the plaintiff was struck by a car used at the time solely in intrastate commerce. It was held that there could be no recovery under the federal act for two reasons, one of them given by the court was that the car was not used in interstate commerce. This ruling was erroneous for it is immaterial whether the instrumentality which caused the injury was at the time being used in interstate commerce. In a case which has been very frequently cited, the rule on this feature is clearly stated as follows: "I am therefore of the opinion that the plaintiff was at the time engaged in interstate commerce and entitled to rights secured by this act. (Plaintiff was repairing a switch on tracks used indiscriminately for both kinds of commerce). That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes every activity when they are engaging in such commerce by their own employes. In short, if the employe was engaged in such commerce, so was the road, for the road was the master, and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."<sup>13</sup>

**§ 551. Intrastate Employes Injured by Negligence of Interstate Employes or Instrumentalities of Interstate**

12. *Granger v. Pennsylvania R. Co.*, 84 N. J. L. 338, 86 Atl. 264.

13. *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832, aff'd in 113 C. C. A. 379, 192 Fed. 901.

**Commerce have no Remedy under Federal Act.** When a servant is employed exclusively in intrastate commerce at the time of his injury, he has no remedy under the federal act, although injured by another employe engaged at the time in interstate commerce or by instrumentalities or appliances used at the time in interstate commerce, as for instance, an interstate train on an interstate highway; because under such conditions the employe himself is not, at the time of the injury, engaged in interstate commerce.<sup>14</sup> Under the very terms of the act a recovery is limited to employes who are injured "while" employed in interstate commerce. Under the conditions named, it is true that the carrier is engaged in interstate commerce but the injured employe is not. However, as pointed out in another paragraph, if the employe is engaged in interstate commerce at the time of his injury although the employe whose negligence caused the injury is engaged exclusively in intrastate commerce or the instrumentality causing the injury is being used solely in intrastate commerce, the injured employe's remedy is nevertheless controlled by the federal act.<sup>15</sup>

**§ 552. Willful Wrongs not Within Terms of the Act.** By its terms the national act is limited to negligent acts of a common carrier. Under well-known principles of law, injuries caused by the willful or intentional acts of another are not within the terms of the statute, for, as quaintly said by one jurist, "when will-

14. "If he (an employe) were in the employe of an interstate carrier, but if his duties were not interstate commerce in character at the time of his death, the fact that he was killed by an interstate passenger train of the defendant company, under the circumstances appearing in the evidence on behalf of the plaintiff in error, would not bring the deceased within the operation of

the Federal Employers' Liability Act." *Hardy v. Atlanta & W. P. R. Co.*, — Ga. App. —, '93 S. E. 18.

15. *Pedersen v Delaware, L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C 153; *Colasurdo v. Central R. R. of New Jersey* 180 Fed. 832, aff'd in 113 C. C. A. 379, 192 Fed. 901.



fulness comes in at the door negligence goes out through the window." Most statutes, giving rights of action for death, define the wrongful act as the "wrongful act, neglect or default of another" which would include intentional wrongs; but the federal act, for some reason, has confined the wrongful acts for which a recovery can be had, to those which are due to negligence solely. A willful assault of one employe upon another would be beyond the terms of the statute.<sup>16</sup>

16. *Roebuck v. Atchison, T. A.* 1917E 741, 162 Pac. 1153.  
& *S. F. R. Co.*, 99 Kan. 544, L. R.

## CHAPTER XXVIII.

### ASSUMPTION OF RISK UNDER LIABILITY ACT.

- Sec. 553. The Statutory Provision.
- Sec. 554. Assumption of Risk a Defense under the Federal Act.
- Sec. 555. Doctrine of Horton Case Reexamined and Reaffirmed by National Supreme Court.
- Sec. 556. Effect of State Constitutions and Statutes Abolishing or Modifying Assumption of Risk on Interstate Employes.
- Sec. 557. Decisions of Federal Courts Control in Determining When Employee Assumes Risk.
- Sec. 558. Ordinary Risks and Known or Obvious Extraordinary Risks Assumed by Interstate Employes.
- Sec. 559. Exception to Rule that Servants Assume Obvious or Known Risks—Promises of Repair.
- Sec. 560. When Assumption of Risk is a Defense to Negligent Acts of Fellow Servants.
- Sec. 561. Analysis of Federal Decisions Applying Doctrine of Assumption of Risk to Interstate Employes of Railroads.
- Sec. 562. Distinction Between Assumption of Risk and Contributory Negligence.
- Sec. 563. When Assumption of Risk is not a Defense—Federal Safety Appliance Laws.
- Sec. 564. State Statutes for Safety of Employes not Included.
- Sec. 565. Assumption of Risk Eliminated in Actions for Violation of Hours of Service Act.
- Sec. 566. Confusing Assumption of Risk with Contributory Negligence in Jury Instructions under Federal Acts.
- Sec. 567. When Assumption of Risk is no Defense When There is a Plurality of Causes.
- Sec. 568. Violation of Rules not Assumption of Risk.
- Sec. 569. Concrete Instruction must be Given, if Requested.
- Sec. 570. Failure to Instruct on Assumption of Risk not Error When Defendant has not been Prejudiced Thereby.
- Sec. 571. Burden of Proving Assumption of Risk upon Defendant.
- Sec. 572. Defense of Assumption of Risk Must be Pleaded to be Available.
- Sec. 573. Cases in Which Interstate Employes were Held to have Assumed the Risk.
- Sec. 574. Cases in Which Interstate Employes were Held was to have Assumed the Risk.

§ 553. **The Statutory Provision.** Section 4 of the federal act provides that in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to,

or the death of, any of its employes such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

§ 554. **Assumption of Risk a Defense under the Federal Act.** After the passage of the act of 1908, several courts held that assumption of risk was not a defense to an action under the federal act.<sup>1</sup> These courts decided that, if the plaintiff's injuries were due to any act of negligence enumerated in the first section of the act, that the result of such negligence could not be assumed by the employe even though he knew the risks and dangers arising therefrom. The decisions of these courts is illustrated by an opinion of Judge McCall in *Wright v. Yazoo & M. V. R. Co.*, cited in the notes, in which he said: "Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents or employes, upon the ground that the servant assumed the risk incident to the negligence of the officers, agents or employes of the carrier. . . . As I construe the act, the risk that the employe now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this act, the assumption of the risk incident to the negligence of the carrier's officers, agents or employes, or any defect or insufficiency due to its negligence, in its cars, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." But these decisions, and others of like import, have, no doubt, been in effect overruled by subsequent decisions of the Supreme Court of the

1. *Wright v. Yazoo & M. V. R. Co.*, 197 Fed. 94; *Sandidge v. Atchison T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867; *Malloy v. Northern Pac. Ry. Co.*, 151 Fed. 1019;

*Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. Cas. (D. C.) 123; *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145.

United States.<sup>2</sup> In the Horton case, cited, the Supreme Court held that except as to violations of federal statutes

2. **United States.** Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169, 61 L. Ed. 228, 37 Sup. Ct. 33; Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; Chesapeake & O. R. Co. v. Proffitt, 241 U. S. 462, 60 L. Ed. 1102, 36 Sup. Ct. 620; Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564; Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586; Baugham v. New York P. & N. R. Co., 241 U. S. 237, 60 L. Ed. 977, 36 Sup. Ct. 592, 13 N. C. C. A. 138; Jacobs v. Southern R. Co., 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588; Great Northern R. Co. v. Knapp, 240 U. S. 464, 60 L. Ed. 745, 36 Sup. Ct. 399; Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834. L. R. A. 1915C 1 Ann. Cas. 1915B 475; Southern Ry. Co. v. Mays, 152 C. C. A. 91, 239 Fed. 41; Philadelphia & R. R. Co. v. Marland, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; New York Cent. & H. River R. Co. v. Salkaukus, 151 C. C. A. 628, 238 Fed. 778; Cincinnati, N. O. & T. P. R. Co. v. Thompson, 149 C. C. A. 211, 236 Fed 1; Portland Terminal Co. v. Jarvis, 141 C. C. A. 562, 227 Fed. 8, 11 N. C. C. A. 1036; New York, N. H. & H. R. Co. v. Vizvari, 126 C. C. A. 632, 210 Fed. 118, L. R. A. 1915C 9.

**Alabama.** Southern Ry. Co. v. Fisher, — Ala. —, 74 So. 580.

**Arkansas.** Kansas City Southern R. Co. v. Livesay, 118 Ark. 304, 177 S. W. 875.

**Georgia.** Southern Ry. Co. v. Blackwell, — Ga. App. —, 93 S. E. 321; Atlantic Coast Line R. Co. v. Kennedy, — Ga. App. —, 92 S. E. 973; Macon, D. & S. R. Co. v. Musgrove, 145 Ga. 647, 89 S. E. 767; Charleston & W. C. R. Co. v. Slyvester, 17 Ga. App. 85, 86 S. E. 275; Kirbo v. Southern R. Co., 16 Ga. App. 49, 84 S. E. 491.

**Indiana.** Cincinnati, H. & D. Ry. Co. v. Gross, — Ind. App. —, 111 N. E. 653.

**Kansas.** Duran v. Atchison, T. & S. F. R. Co., 100 Kan. 189, 165 Pac. 653; Spinden v. Atchison, T. & S. F. R. Co., 95 Kan. 474, 148 Pac. 747; Barker v. Kansas City, M. & O. R. Co., 88 Kan. 767, 43 L. R. A. (N. S.) 1121, 129 Pac. 1151.

**Kentucky.** Louisville & N. R. Co. v. Williams', Adm'r, 175 Ky. 679, 194 S. W. 920; Jones v. Southern Ry. in Kentucky, 175 Ky. 455, 194 S. W. 558; Lexington & E. R. Co. v. Stacy, 172 Ky. 195, 189 S. W. 25; Judd's Adm'r v. Southern R. Co., 171 Ky. 832, 188 S. W. 880; Louisville, H. & St. L. R. Co. v. Wright, 170 Ky. 230, 185 S. W. 861; Cincinnati, N. O. & T. P. R. Co. v. Claybourne's Adm'r, 169 Ky. 315, 183 S. W. 903; Louisville & N. R. Co. v. Henry, 167 Ky. 151, 180 S. W. 74; Louisville & N. R. Co. v. Patrick, 167 Ky. 118, 180 S. W. 55; Davis v. Chesapeake & O. R. Co., 166 Ky. 490, 179 S. W. 422; Chesapeake & O. R. Co. v. Walker's Adm'r, 159 Ky. 237, 167 S. W. 123; Glenn v. Cincinnati, N. O. & T. P. R. Co., 157 Ky. 453, 163 S. W. 461;



enacted for the safety of employes, the defense of as-

**Helm v. Cincinnati, N. O. & T. P. R. Co.**, 156 Ky. 240, 160 S. W. 945.

**Maine.** *Norton v. Maine Cent. R. Co.*, — Me. —, 100 Atl. 598.

**Michigan.** *Chapman v. Ann Arbor R. Co.*, — Mich. —, 163 N. W. 107; *Sims v. Minneapolis, St. P. & S. S. M. Ry. Co.*, — Mich. —, 162 N. W. 988.

**Missouri.** *Winslow v. Missouri K. & T. Ry. Co.* (Mo. App.), 192 S. W. 121; *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202, 177 S. W. 1127.

**Montana.** *Sorenson v. Northern Pac. R. Co.*, 53 Mont. 268, 163 Pac. 560.

**Nebraska.** *Henderson v. Union Pac. R. Co.*, 100 Neb. 734, 161 N. W. 267.

**New Hampshire.** *Topore v. Boston & M. R. R.*, — N. H. —, 100 Atl. 153.

**New Jersey.** *Willever v. Delaware, L. & W. R. Co.*, 89 N. J. L. 697, 99 Atl. 321.

**New York.** *Swartwood v. Lehigh Valley R. Co.*, 169 N. Y. App. Div. 759, 155 N. Y. Supp. 778.

**North Dakota.** *Manson v. Great Northern R. Co.*, 31 N. D. 643, 155 N. W. 32.

**Oklahoma.** *Chicago, R. I. & P. Ry. Co. v. Hughes*, — Okla. —, 166 Pac. 411; *Chicago, R. I. & P. Ry. Co. v. Jackson*, — Okla. —, 160 Pac. 736; *Chicago, R. I. & P. Ry. Co. v. Rogers*, — Okla. —, 159 Pac. 1132; *Chicago, R. I. & P. Ry. Co. v. Felder*, — Okla. —, 155 Pac. 529.

**Oregon.** *Oberlin v. Oregon-Washington R. & Nav. Co.*, 71 Ore. 177, 142 Pac. 554.

**Pennsylvania.** *Haas v. Erie R. Co.*, 254 Pa. 235, 98 Atl. 867; *Hartman v. Western Maryland R. Co.*, 246 Pa. 460, 92 Atl. 698.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767; *Atchison, T. & S. F. Ry. Co. v. Ayers*, — Tex. Civ. App. —, 192 S. W. 310; *Gulf, C. & S. F. Ry. Co. v. Cooper*, — Tex. Civ. App. 191 S. W. 579; *Kansas City, M. & O. Ry. Co. of Texas v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143; *Texas & P. Ry. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185; *Ft. Worth & D. C. Ry. Co. v. Copeland*, — Tex. Civ. App. —, 164 S. W. 857; *Missouri, K. & T. Ry. Co. of Texas v. Scott*, — Tex. Civ. App. —, 160 S. W. 432.

**Vermont.** *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925.

**Virginia.** *Norfolk & W. R. Co. v. Tucker's Adm'x*, 120 Va. 540, 91 S. E. 614; *Chesapeake & O. R. Co. v. Meadows*, 119 Va. 33, 13 N. C. C. A. 376, 89 S. E. 244.

**Washington.** *Toler v. Northern Pac. R. Co.*, 94 Wash. 360, 162 Pac. 538; *Swanson v. Oregon-Washington R. & Nav. Co.*, 92 Wash. 423, 159 Pac. 379.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060.

**Wisconsin.** *Reul v. Wisconsin N. W. Ry. Co.*, — Wis. —, 163 N. W. 189; *Hovaneck v. Great Northern R. Co.*, 165 Wis. 511, 162 N. W. 927; *Smiegil v. Great Northern R. Co.*, 165 Wis. 57, 160 N. W. 1057; *Graber v. Duluth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

A charge to a jury that an employe only assumed the ordinary risk of his employment and that

sumption of risk shall have its former effect as a complete bar to an action under the statutes. The court in that case said: "It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." An instruction given by the trial court in that case pursuant to a statute of the state so providing that a railroad employe did not assume any defective appliance furnished by the employer, was held erroneous and not a proper application of the rule under the federal act. The court held that under the common law doctrine of assumption of risk, the employe assumed defects due to the master's negligence when these defects and risks arising therefrom were known to him or were open and obvious or plainly observable.

**§ 555. Doctrine of Horton Case Re-examined and reaffirmed by National Supreme Court.** The construction which the national Supreme Court, in the Horton case,<sup>3</sup> placed upon section 4 of the Federal Act, viz., that Congress by eliminating the defense of assumption of risk in cases where the violation of any federal statute for the safety of employes contributed to the injury, plainly indicated a legislative intent that, in all other cases, assumption of risk should have its former effect as a complete bar to an action for damages, was

he never assumed the risk of the negligence of his fellow employes was erroneous; for "if the negligence of all these should be excluded in actions under the Employers' Liability Act, it is difficult to say what practical application could ever be given in them to the established doctrine concerning assumption or risk." *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441, 62 L. Ed. —, 38 Sup. Ct. 139.

If an employe has knowledge of

the conditions and the dangers, or if these are obvious, and he continues in the employment, without objection, he is held to have assumed the risk, although he may be injured by reason of some neglect of the employer. *Gaddy v. North Carolina R. Co.*, — N. C. —, 95 S. E. 925.

3. 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

re-examined by the same court two years later in the case of *Jacobs v. Southern R. Co.*<sup>4</sup> It was contended by the plaintiff in error that employes engaged in interstate commerce assumed only the ordinary risks and hazards of the business of a common carrier and did not assume the risk of the carrier's negligence under any conditions; that knowledge by an employe of a defective or dangerous condition, due to negligence, did not bar a recovery, but might be considered in determining contributory negligence for the purpose of reducing the damages only, and that whatever the evidence might be as to an employe's knowledge of a dangerous condition he did not assume the risk if the carrier was negligent. "The argument to sustain the assertion," said the court in reaffirming its former ruling, "and to present what he deems to be the true construction of act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express his contention in any pointed proposition. He makes it through a comparison of the sections of the act and insists that to retain the common-law doctrine of the assumption of risk is to put the fourth section in conflict with the other sections. The basis of the contention is that the act was intended to be punitive of negligence and does not cast on the employees of carriers the assumption of risk of any condition or situation caused by such negligence. This is manifest, it is insisted, from the provisions of the third section of the act which pro-

4 . 241 U. S. 229, 60 L. Ed. 970 36 Sup. Ct. 588. The point involved in this case was the action of the trial court in giving the following charge to the jury: "The Court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the

same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress Approved April 22, 1908, permits this defense; and the jury should find their verdict for the defendant."

vides that the contributory negligence of the employee 'shall not bar a recovery,' and of the fifth section which precludes the carrier from exempting itself from liability. This purpose is executed and can only be executed, it is urged, by construing the words of Section 4 (which we shall presently quote) to apply to 'the ordinary risks inherent in the business the unavoidable risks which are intrinsic notwithstanding the performance by the carrier of its personal duties. They do not include the 'secondary and ulterior' risks arising from abnormal dangers due to the employer's negligence.' And, further: 'The object of this section was not to adopt by *implication* the common-law defense of assumption of risk of such abnormal dangers. Its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the 'risks of his employment' assumed by the employee. These, then, are the considerations which plaintiff says were not submitted to the court in the *Horton Case* and which he urges to support his contention that assumption of risk has been abolished absolutely. We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language and makes it express one meaning when it intended another. The language of section 4 demonstrates its meaning. It provides that in any action brought by an employe he 'shall not be held to have assumed the risks of his employment in any case where the violation by said common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.' It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employes. In other cases, therefore, it is retained. And such is the ruling in the *Horton Case*, made upon due consideration and analysis of the statute and those to which it referred."

§ 556. **Effect of State Constitutions and Statutes Abolishing or Modifying Assumption of Risk on Inter-**



**state Employees.** A statute of a state abolishing or modifying the common law defense of assumption of risk, does not govern in actions for injuries by employees of common carriers by railroad while engaged in interstate commerce.<sup>5</sup> Thus, a statute of the state of Texas provided that if an employer had knowledge of a negligent defect, the employee did not assume the risk of injury raising therefrom. The court held that this statute had no application to employees of railroads working in interstate commerce.<sup>6</sup> The constitution of the state of Oklahoma requires the submission of the defense of assumption of risk as a question of fact for the jury. In an action under the federal act it was insisted that this provision controlled and that the court could, in no case, declare as a matter of law that an employee assumed the risk. But it was held that this defense as to interstate employees was not effected by the constitutional provision. "In cases where the evidence is undisputed and the circumstances permit of but one conclusion, the question must be decided by the court as a matter of law, and not by the jury as a matter of fact, since such is the common law, and such must be the result in our courts in these cases where the federal act creating the liability likewise allows the common law defense."<sup>7</sup> A statute of the state of Ohio abolishing the rule of the common law as to assumption of risk in injuries occasioned by defects in rails, tracks or other machin-

5. *Knapp v. Great Northern R. Co.*, 130 Minn. 405, 153 N. W. 848; *Texas & P. Ry. Co. v. White*, — Tex. Civ. App. —, 177 S. W. 1185; *Southern Ry. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.

6. *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767, wherein the court said: "It is clear to us that by this act Congress occupied the field of assumed risk, and that such law would govern in this case to the exclusion of the rule announced

by the Texas statutes to be applied in cases of assumed risk. The rule that a state law must yield when a federal law has occupied the field on a question of interstate commerce is universally recognized, and of its correctness there can be no question; the federal Constitution having authorized Congress to act."

7. *Chicago, R. I. & P. Ry. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

ery, was inapplicable to interstate employees suing under the federal act.<sup>8</sup>

§ 557. **Decisions of Federal Courts Control in Determining When Employee Assumes Risk.** Whenever Congress enacts statutes pursuant to its power under the commerce clause, such laws, when enforced in both state and federal courts, must be construed in the light of federal decisions and applicable common law principles as interpreted and applied in the federal courts to the exclusion of common law rules different therefrom enforced in state courts.<sup>9</sup> It therefore follows that even in actions under the federal act prosecuted in state courts, the decisions of the state courts do not govern in determining the application of the doctrine of assumption of risk if the rules therein adopted differ from those applied in the federal courts.<sup>10</sup>

8. Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. Ed. 671, 35 Sup. Ct. 306.

9. Southern R. Co. v. Gray, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; Southern R. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469; Great Northern R. Co. v. Wiles, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, 60 L. Ed. 453, 36 Sup. Ct. 177; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. 148, 44 L. R. A. (N. S.) 257. See Section 18, *supra*.

10. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475; Glenn v. Cincinnati,

N. O. & T. P. R. Co., 157 Ky 453, 163 S. W. 461; Castonia v. Maine Cent. R. R. — N. H. —, 100 Atl. 601; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033. *Contra*: Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106, 8 N. C. C. A. 538, Ann. Cas. 1916B 147, 172 S. W. 340.

The case of Williams v. Pryor, 272 Mo. 613, 200 S. W. 53, in which the Missouri Supreme court refused to apply the doctrine of assumption of risk as interpreted in the national courts but followed its own rulings to the effect that an employee does not under any circumstances assume the negligence of the master, was taken to the federal Supreme court on writ of *certiorari* and was pending in that court at the time of the publication of this treatise. See Boldt v. Pennsylvania R. Co., 245 U. S. 441, 62 L. Ed. —, 38 Sup. Ct. 139.

§ 558. **Ordinary Risks and Known or Obvious Extraordinary Risks Assumed by Interstate Employees.** The nature and elements of the doctrine of assumption of risk as applied to interstate employees of interstate carriers under the federal act have been well established in a series of controlling decisions by the United States Supreme Court.<sup>11</sup> The risks that may be assumed by an interstate employe are of two kinds, ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employe voluntarily engages. An employe is conclusively

11. *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441 62 L. Ed. —, 38 Sup. Ct. 139; *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. Ed. 1102, 36 Sup. Ct. 620; *Southern R. Co. v. Gray*, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564; *Louisville & N. R. Co. v. Stewart*, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586; *Baugham v. New York, P. & N. R. Co.*, 241 U. S. 237, 60 L. Ed. 977, 36 Sup. Ct. 592, 13 N. C. C. A. 138; *Jacobs v. Southern R. Co.*, 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588, *Seaboard Air Line Ry. v. Horton*, 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. 180; *Kanawha & M. R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865; 9 N. C. C. A. 265, Ann. Cas. 1916B 252; *Seaboard Airline Ry. v. Padgett*, 236 U. S. 668, 59 L. Ed. 777, 35 Sup. Ct. 481; *McGover v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. Ed. 283, 35 Sup. Ct. 127, 8 N. C. C. A. 67; *Yazoo & M. V. R. Co. v.*

*Wright*, 235 U. S. 376, 59 L. Ed. 277, 35 Sup. Ct. 130; *Southern R. Co. v. Gadd*, 233 U. S. 572, 58 L. Ed. 1099, 34 Sup. Ct. 696; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834; L. R. A. 1915C 1, Ann. Cas. 1915B 475; *Gila Valley G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 34 Sup. Ct. 229, aff'g 13 Ariz. 170, 1, N. C. C. A. 362, 112 Pac. 845; *Texas & P. R. Co. v. Harvey*, 228 U. S. 319, 57 L. Ed. 852, 33 Sup. Ct. 518; *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561; *Butler v. Frazee*, 211 U. S. 459, 53 L. Ed. 281, 29 Sup. Ct. 136; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. 24; *Texas & P. R. Co. v. Archibald*, 170 U. S. 665, 42 L. Ed. 1188 18 Sup. Ct. 777; *Philadelphia & R. R. Co. v. Maryland*, 152 C. C. A. 51, 239 Fed. 1, 15 N. C. C. A. 402; *Cincinnati, N. O. & T. P. R. Co. v. Thompson*, 149 C. C. A. 211, 236 Fed. 1; *Portland Terminal Co. v. Jarvis*, 141 C. C. A. 562, 227 Fed. 8, 11 N. C. C. A. 1036; *Michigan Cent. R. Co. v. Schaffer*, 136 C. C. A. 413, 220 Fed. 809.

presumed to have knowledge of such risks and assumes injuries arising therefrom.<sup>12</sup> Such ordinary risks are assumed by an employe whether he is actually aware of them or not; for the dangers and risks that are normally or necessarily incident to his occupation are presumably taken into account in fixing the rate of wages. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the carrier to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These are known as extraordinary risks. An employe has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has knowledge of them and the danger arising therefrom, or unless the risk and danger are so obvious that an ordinarily prudent person under similar circumstances would have known the risk and appreciated the danger arising therefrom.<sup>13</sup> The following excerpts

12. **United States.** *Chicago & N. W. R. Co. v. Bower*, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. -d. 1016, 36 Sup. Ct. 564; *Jacobs V. Southern R. Co.*, 241 U. S. 229, 60 L. Ed. 970, 36 Sup. Ct. 588; *Seaboard Air Line Ry. v. Horton*, 239 U. S. 595, 60 L. Ed. 158, 36 Sup. Ct. 180.

**Arizona.** *Guana v. Southern Pac. Co.*, 15 Ariz. 413, L. R. A. 1917D 1206, 139 Pac. 782.

**Georgia.** *Hightower v. Southern R. Co.*, 146 Ga. 279, L. R. A. 1917C 481, 91 S. E. 52.

**Kentucky.** *Louisville, H. & St. L. R. Co. v. Wright*, 170 Ky. 230, 185 S. W. 861; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471.

**Michigan.** *Gaines v. Grand Trunk R. Co. of Canada*, 193 Mich.

398, 159 N. W. 542.

**Minnesota.** *Thompson v. Minneapolis & St. L. R. Co.*, 133 Minn. 203, 158 N. W. 42.

**Missouri.** *Cross v. Chicago, B. & Q. R. Co.*, 191 Mo. App. 202, 177 S. W. 1127.

**Virginia.** *Chesapeake & O. R. Co. v. Meadows*, 119 Va. 33, 13 N. C. C. A. 376, 89 S. E. 244.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060.

**Wisconsin.** *Smiegil v. Great N. R. Co.*, 165 Wis. 57, 160 N. W. 1057; *Graber v. Dufuth, S. S. & A. R. Co.*, 159 Wis. 414, 150 N. W. 489.

13. **Alabama.** *Western Ry. of Alabama v. Mays*, — Ala. —, 72 So. 641; *Southern Ry. Co. v. Fisher*, — Ala. —, 74 So. 580.

**Arkansas.** *St. Louis, I. M. & S. Ry. Co. v. Howard*, 124 Ark. 588,



from decisions of the United States Supreme Court construing the Federal Employers' Liability Act illus-

188 S. W. 14; *Kansas City S. Ry. Co. v. Livesay*, 118 Ark. 304, 177 S. W. 875; *St. Louis, I. M. & S. Ry. Co. v. Birch*, 89 Ark. 424, 28 L. R. A. (N. S.) 1250, 117 S. W. 243.

**Georgia.** *Atlantic Coast Line R. Co. v. Kennedy*, — Ga. —, 92 S. E. 973; *Hightower v. Southern R. Co.*, 146 Ga. 279, L. R. A. 1917C 481, 91 S. E. 52; *Macon, D. & S. R. Co. v. Musgrove*, 145 Ga. 647, 89 S. E. 767; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Kirbo v. Southern R. Co.*, 16 Ga. App. 49, 84 S. E. 491; *Emanuel v. Georgia & F. R. Co.*, 142 Ga. 543, 8 N. C. C. A. 25, 83 S. E. 230.

**Kansas.** *Duran v. Atchison, T. & S. F. R. Co.*, 100 Kan. 189, 165 Pac. 653; *Smith v. St. Louis & S. F. R. Co.* 95 Kan. 451, 148 Pac. 759; *Spinden v. Atchison, T. & S. F. R. Co.*, 95 Kan. 474, 148 Pac. 747.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. York*, 176 Ky. 9, 194 S. W. 1034; *Jones v. Southern Ry. in Kentucky*, 175 Ky. 455, 194 S. W. 558; *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621; *Louisville, H. & St. L. R. Co. v. Wright*, 170 Ky. 230, 185 S. W. 861; *Cincinnati, N. O. & T. P. R. Co. v. Claybourne's Adm'r*, 169 Ky. 315, 183 S. W. 903; *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55; *Davis v. Chesapeake & O. R. Co.*, 166 Ky. 490, 179 S. W. 422; *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, 156 Ky. 410, 161 S. W. 246.

**Louisiana.** *Lanis v. Illinois Cent. R. Co.*, 140 La. 1, 72 So. 788.

**Maine.** *Norton v. Maine Cent. R. Co.*, — Me. —, 100 Atl. 598.

**Maryland.** *Baltimore & O. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225.

**Michigan.** *Chapman v. Ann Arbor R. Co.*, — Mich. —, 163 N. W. 107; *Sims v. Minneapolis, St. P. & S. S. M. Ry. Co.*, — Mich. —, 162 N. W. 988; *Gaines v. Grand Trunk R. Co. of Canada*, 193 Mich. 398, 159 N. W. 542; *Chapman v. United States Exp. Co.*, 192 Mich. 654, 159 N. W. 308.

**Minnesota.** *Marshall v. Chicago, R. I. & P. R. Co.*, 131 Minn. 392, 155 N. W. 208.

**Missouri.** *Winslow v. Missouri, K. & T. Ry. Co. (Mo. App.)*, 192 S. W. 121.

**Montana.** *Sorenson v. Northern Pac. R. Co.*, 53 Mont. 268, 163 Pac. 560.

**Nebraska.** *Phillips v. Union Pac. R. Co.*, 100 Neb. 157, 158 N. W. 966.

**New Hampshire.** *Castonia v. Maine Cent. R. R.*, — N. H. —, 100 Atl. 601; *Tapore v. Boston & M. R. R.*, — N. H. —, 100 Atl. 153.

**New Jersey.** *Ambrecht v. Delaware, L. & W. R. Co.*, — N. J. L. —, 101 Atl. 203; *Willever v. Delaware, L. & W. R. Co.*, 89 N. J. L. 697, 99 Atl. 321; *Cetola v. Lehigh Valley R. Co.*, 89 N. J. L. 691, 99 Atl. 310; *Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764.

**North Carolina.** *Hinson v. Atlanta & C. Air Line R. Co.*, 172 N. C. 646, 90 S. E. 772; *Lloyd v.*

trate the federal rule as to assumption of risks by interstate employees: "While an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it."<sup>14</sup> "Some employments are necessarily fraught with danger to the

**Southern R. Co.**, 166 N. C. 24, 7 N. C. C. A. 520, 81 S. E. 1003.

**Oklahoma.** *Chicago, R. I. & P. Ry. Co. v. Jackson*, — Okla. —, 160 Pac. 736.

**Pennsylvania.** *Falyk v. Pennsylvania R. Co.*, 256 Pa. 397, 100 Atl. 961.

**South Carolina.** *Ballenger v. Southern R. Co.*, 106 S. C. 200, 90 S. E. 1019.

**Texas.** *Gulf, C. & S. F. Ry. Co. v. Hall*, — Tex. Civ. App. —, 196 S. W. 613; *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767; *Gulf, C. & S. F. Ry. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579; *Kansas City, M. & O. Ry. Co. of Texas v. Finke*, — Tex. Civ. App. —, 190 S. W. 1143; *Panhandle & S. F. Ry. Co. v. Fitts*, — Tex. Civ. App. — 188 S. W. 528.

**Vermont.** *Robie v. Boston & M. R. R.*, — Vt. —, 100 Atl. 925.

**Virginia.** *Norfolk & W. Ry. Co. v. Tucker's Adm'x*, 120 Va. 540, 91 S. E. 614.

**Washington.** *Swanson v. Oregon-Washington R. & Nav. Co.*, 92 Wash. 423, 159 Pac. 379.

**West Virginia.** *Hull v. Virginian R. Co.*, 78 W. Va. 25, 88 S. E. 1060.

**Wisconsin.** *Ruel v. Wisconsin & N. W. Ry. Co.*, — Wis. —, 163 N. W. 189; *Smiegil v. Great Northern R. Co.*, 165 Wis. 57, 160 N. W. 1057.

"The true rule deducible from the authorities is that the servant assumes all the ordinary, usual, and normal risks of the business after the master has used reasonable care for his protection, and also all such other risks as he knows of, or which were so unquestionably plain and clear that he must have known of their existence and their danger to him." *Chesapeake & O. R. Co. v. Meadows*, 119 Va. 33, 13 N. C. C. A. 376, 89 S. E. 244.

14. *Chesapeake & O. R. Co. v. Proffitt*, 241 U. S. 462, 60 L. Ed. 1102, 36 Sup. Ct. 620.

workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. *Choctaw, Oklahoma & Gulf R. Co. v. McDade*, 191 U. S. 64, 68; *Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 220 U. S. 590, 596; *Tex. & Pac. Ry. Co. v. Harvey*, 228 U. S. 319, 321; *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 102, and cases cited. When the employe does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arise out of the master's breach of duty;"<sup>15</sup> "An employe assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employe has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is at-

15. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

tributable to the employer's negligence, until the employe becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employe with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it."<sup>16</sup>

**§ 559. Exception to Rule that Servant Assumes Obvious or Known Risks—Promises of Repair.** To the rule explained in the foregoing paragraph that an employe assumes the obvious and known risks of his employment even if due to the employer's negligence, an exception is made where the master has promised to remedy the defect or to make the place safe and the servant continues to work in reliance upon such promise.<sup>17</sup> If an employe knows of a defect and appreciates the risk that is attributable to it, then he assumes the risk even though it arises from the master's breach of duty if he continues in the employment without objection, or without obtaining from the employer an assurance that the defect will be remedied; but if there is a promise of reparation, then, during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employe, relying upon such promise, does not assume the risk unless at least the danger be so imminent that no ordina-

16. *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 34 Sup. Ct. 229, *aff'g.* 13 *Ariz.* 170, 1 N. C. C. A. 362, 112 *Pac.* 845.

17. *Seaboard Air Line Ry. v. Lorick*, 243 U. S. 572; 61 L. Ed. —, 37 Sup. Ct. 440; *Texas & P. R. Co. v. Harvey*, 228 U. S. 319, 57

L. Ed. 852, 33 Sup. Ct. 518; *Southwestern Brewery & Ice Co. v. Schmidt*, 226 U. S. 162, 57 L. Ed. 170, 33 Sup. Ct. 68; *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561; *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612.



rily prudent person, under similar circumstances, would rely upon such a promise. For, when a servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk. Thus, on a second writ of error to the United States Supreme Court in the case of *Seaboard Air Line Ry. v. Horton*,<sup>18</sup> a verdict and judgment for the plaintiff was affirmed, as it appeared in evidence on the second trial that the employer had assured the plaintiff that the defect would be remedied.

§ 560. **When Assumption of Risk is a Defense to Negligent Acts of Fellow Servants.** While the federal statute abrogates the common-law fellow-servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer,<sup>19</sup> yet, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of federal statute enacted for the safety of employes may contribute to the injury or death, the act places a co-employee's negligence, when it is the ground of the action, in the same relation as the employer's own negligence upon the question whether an employee is deemed to have assumed the risk.<sup>20</sup> The decision of the national court in the *DeAtley* case, in effect, overrules many decisions of the state and intermediary federal courts holding that an employee under the federal act never, under any circumstances, assumes the risk of injury from the negligence of a co-employee.<sup>21</sup> Under the fed-

18. 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. 180.

19. Section 428, *supra*.

20. *Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564.

21. *United States. Northern Pac. R. Co. v. Maerkl*, 117 C. C. A. 237, 198 Fed. 1.

*Alabama. Louisville & N. R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

*Kansas. Hackney v. Missouri, K. & T. R. Co.*, 96 Kan. 30, 149 Pac. 421.

*Mississippi. Elliott v. Illinois Cent. R. Co.*, 111 Miss. 426, 71 So. 741.

*New Hampshire. Caverhill v. Boston & M. R. R.*, 77 N. H. 330, 91 Atl. 917.

*New Jersey. Grybowski v. Erie R. Co.*, 88 N. J. L. 1, 95 Atl. 764.

eral act, an employe has the right to presume that the employer has exercised reasonable care for his safety, and this presumption applies to the acts of a fellow servant. He does not ordinarily assume the negligent act of a fellow servant; but if he becomes aware of the risk and danger arising therefrom and continues in the employment, or if the risk and danger arising therefrom are so obvious that an ordinarily prudent person under the same circumstances would have observed the one and appreciated the other, then an employe assumes the risk arising from the negligent act of a co-employe under the national statute.<sup>22</sup> "The act of Congress, by gating the common-law rule known as the fellow-servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of a statute enacted for the safety of em-

**South Carolina.** Thornton v. Seaboard Air Line, Ry. 98 S. C. 348, 82 S. E. 433.

**Texas.** Missouri, K. & T. Ry. Co. of Texas v. Freeman, — Tex. Civ. App. —, 168 S. W. 69.

**West Virginia.** Easter v. Virginian R. Co., 76 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

**Wisconsin.** Sweet v. Chicago & N. W. R. Co., 157 Wis. 400, 147 N. W. 1054.

22. Chicago & N. W. R. Co. v. Bower, 241 U. S. 470, 60 L. Ed. 1107, 36 Sup. Ct. 624; Southern R. Co. v. Gray, 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558; Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. Ed. 989, 36 Sup. Ct. 586; Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. Ed. 458, 36 Sup. Ct. 180; Yazoo & M. V. R. Co. v. Wright, 235 U. S. 376, 59 L. Ed. 277, 35 Sup. Ct. 130; Seaboard Air Line R. Co. v.

Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475; Gila Valley G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. Ed. 521, 34 Sup. Ct. 229, aff'd 13 Ariz. 170, 1 N. C. C. A. 362, 112 Pac. 845; Cross v. Chicago B. & Q. R. Co. (Mo. App.), 186 S. W. 1130; Castonia v. Maine Cent. R. Co., — N. H. —, 100 Atl. 601.

An employe does not assume the negligence of a fellow servant under the federal act unless it be made to appear first, that the negligence was either in fact known to the plaintiff, or was so customary that he must be charged with knowledge, and, second, that he must appreciate, or be bound to appreciate, the danger. Michigan Cent. R. Co. v. Schaffer, 136 C. C. A. 413, 220 Fed. 809.

ployees may contribute to the injury or death of an employee (*Seaboard Air Line v. Horton*, 233 U. S. 492, 502) making the carrier liable for an employee's injury 'resulting in whole or in part from the negligence of any of the officers, agents or employees' of the carrier, abrothe Act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk. On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other. \* \* \* It is insisted that the true test is, not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary,

unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.’<sup>23</sup>

§ 561. **Analysis of Federal Decisions Applying Doctrine of Assumption of Risk to Interstate Employees of Railroads.** In *Cincinnati, N. O. & T. P. R. Co. v. Thompson*,<sup>24</sup> wherein the court under the facts held that a brakeman alighting from a moving train, did not, as a matter of law, assume the risk of stepping upon a piece of slag near the track, Judge Cochran, in an exhaustive opinion, clearly and accurately discussed the doctrine of assumption of risk as applied in the decisions of the United States Supreme Court to interstate employees of railroads. He said: “There are several propositions in this connection as to which there ought to be no controversy. Some of them favor plaintiff, and some defendant. It will help if we first dispose of them so that the single question on which the case hangs may be seen in all its nakedness. Those that favor defendant are these: It is trite that two things are essential to make out the defense, to wit, knowledge of the defective condition out of which the risk arose, and appreciation of the risk arising therefrom. These two, indeed, may be reduced to one, i. e., knowledge of such condition and of such risk. In the case of *Chicago & E. R. Co. v. Ponn*, 191 Fed. 682, 112 C. C. A. 228, Judge Hollister said that the word appreciated ‘does not mean more than actual knowledge. It does not mean less.’ Here, there can be no question that plaintiff appreciated, i. e., knew, the risk. The quotation heretofore made from his testimony contains an express admission that he did. The only possible question is whether he knew the conditions out of which the risk arose. Again, it is not essential that plaintiff knew that

23. *Mr. Justice Pitney in Chesapeake & O. R. Co. v. De Atley*, 241 U. S. 310, 60 L. Ed. 1016, 36 Sup. Ct. 564.

24. *Cincinnati, N. O. & T. P. R. Co. v. Thompson*, 149 C. C. A. 211, 236 Fed. 1.



the particular piece of slag, stepping on which caused his injury, was there. It is sufficient if he knew that such slag, i. e., slag of that character or slag substantially as large and as dangerous as that piece, were lying loose in and about the place where he alighted. And again, his denial of such knowledge is not merely not conclusive of the question. It may be of no value whatever in determining it. Notwithstanding such denial, it may be that it should be taken that he did in fact have such knowledge. In the case of *Chesapeake & Ohio Ry. Co. v. Proffitt*, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102, Mr. Justice Pitney said that the employe was 'not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it.' Language to the same effect may be found in numerous decisions of the Supreme Court. *Washington & G. R. R. Co. v. McDade*, 135 U. S. 554, 573, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Choctaw, O. & G. R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Butler v. Frazee*, 211 U. S. 459, 467, 29 Sup. Ct. 136, 53 L. Ed. 281; *Schlemmer v. Buffalo R. & P. Co.*, 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596; *Texas & Pacific R. R. Co. v. Harvey*, 228 U. S. 319, 321, 322, 33 Sup. Ct. 518, 57 L. Ed. 852; *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 102, 34 Sup. Ct. 229, 58 L. Ed. 521; *Seaboard Air Line R. R. Co. v. Horton*, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062 L. R. A. 1915C, 1 Ann. Cas. 1915 B, 475. The presumption here referred to, I take it, is conclusive. It cannot be overthrown or affected to any extent by a mere denial on the part of the employe. In *Butler v. Frazee*, *supra*, a peremptory instruction was upheld in face of a denial by the plaintiff, whose hand had been injured, whilst feeding a mangle in a steam laundry. The denial there, however, was of appreciation and not of knowledge of the condition out of which the risk arose; but, if such a denial was of no avail, a denial of such knowledge could not have been of any more value. Mr. Justice Moody said: 'The contention, however, is that, as the

plaintiff testified in substance that she did not know and appreciate the danger which she was encountering, that testimony, with the other facts in the case, raised an issue for the jury, and that it could not be said, as a matter of law, that the risk had been assumed. This contention is sustained by a well-considered case. *Stager v. Troy Laundry Co.*, 38 Or. 480 (63 Pac. 645, 53 L. R. A. 459).’ To this contention he responded: ‘But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employe is of full age, intelligence, and adequate experience, in all these elements of the problem appear without contradiction from the plaintiff’s own evidence, the question becomes one of law for the decision of the court.’ The recent case of *Jacobs v. Southern R. Co.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970, which in some of its features is more like the one in hand than any other in the Supreme Court, also involved a denial of appreciation, i.e., knowledge of the risk. There the question of the assumption of risk was left to the jury, which found in defendant’s favor. Seemingly, it was urged that because of this denial that question should not have been left to the jury. Scant consideration, however, was given to the denial, Mr. Justice McKenna said: ‘He (i.e., the fireman who was injured whilst attempting to mount his engine when in motion from a cinder pile) admitted a knowledge of the ‘material conditions,’ and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding ‘not over a gallon,’ could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them.’ That this presumption is so strong indicates how ‘rigorous and vigorous’ must be the circumstances

which give rise to it. They may be thus put: The defective condition and the risk must have been so obvious and the employe's relation thereto must have been so close and intimate that he could not help but have known of them. This makes a denial by him of knowledge thereof in effect a denial of a physical fact. The case of *Butler v. Frazee*, *supra*, is an apt illustration of the circumstances under which the presumption arises. The defect in the mangle complained of consisted in the excessive height of the finger guard rail above the feed board. This was obvious to any one looking at it. The plaintiff's relation to the defective condition and the risk was as close and intimate as it could be. As she fed the mangle, it was right in front of her, and she had worked at it for some months before she was injured. This, of course, was a strong case for the presumption to arise. It was so strong that plaintiff did not deny that she knew of the defective condition. Conceivably cases may exist not so strong as this and yet strong enough to give rise to the presumption. But in one and all, in order thereto, the defective condition and the risk must have been so obvious and the employe's relation thereto must have been so close and intimate that he could not help but have known of them. It must be taken, therefore, that plaintiff's denial of knowledge of the presence of slag such as that upon which he stepped was not only not conclusive as to his state of knowledge, but it may not have been sufficient to make the question in regard thereto one for the jury to determine. The circumstances may be so coercive that it must be conclusively presumed that he had knowledge thereof. The propositions referred to favoring plaintiff are two. Knowledge on his part of the conditions out of which the risk which he incurred arose cannot be presumed from the fact that an ordinarily prudent person in like business, under like circumstances, would have ascertained that condition either just before he jumped or theretofore. This fact made out a case of contributory negligence, not one of assumption of risk. That the two defenses are distinct is

nowhere better settled than by the decisions of the Supreme Court of the United States. The matter is dealt with the following cases: *Choctaw, O. & G. R. Co. v. McDade*, *supra*, 191 U. S. 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Schlemmer v. Buffalo R. P. Co.*, *supra*, 220 U. S. 596, 31 Sup. Ct. 561, 55 L. Ed. 596; *Seaboard A. L. R. R. Co. v. Horton*, *supra*, 223 U. S. 503, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Yazoo & M. V. R. R. Co. v. Wright*, 235 U. S. 379, 35 Sup. Ct. 130, 59 L. Ed. 277. In the *Schlemmer* Case, Mr. Justice Day said that the distinction between the two defenses was 'practical and clear,' and, in the *Horton* Case, Mr. Justice Pitney said that it was 'simple.' This court, speaking through Judge Hollister, in the *Ponn* Case, 191 Fed. 687, 112 C. C. A. 228, said that they were 'entirely distinct.' The distinction was again noted by it in *Sterling Paper Co. v. Hamel*, 207 Fed. 300, 304, 125 C. C. A. 44, and *Yazoo R. Co. v. Wright*, 207 Fed. 281, 285, 125, C. C. A. 25. In the case of *McMyler Mfg. Co. v. Mehnke*, 209 Fed. 5, 126 C. C. A. 147, through Judge Denison, it said: 'When each, alike, constituted a complete defense, the distinction was largely academic, and it was natural that the terms should be used with some confusion; but, now that statutes have made differences in the defensive value of the two things, the distinction has become vital and has been the subject of much judicial inquiry.' He dealt therein with what he termed the 'seeming conflict' between the statement of Mr. Justice Holmes in the first *Schlemmer* Case, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681, that assumption of risk 'obviously shades into negligence as commonly understood,' and that 'the difference between the two is one of degree rather than of kind,' and that of Mr. Justice Day in the second one that 'there is, nevertheless, a practical and clear distinction between the two.' Knowledge of the risk is the watchword of the defense of assumption of risk; want of due care in view thereof is that of contributory negligence; and these are distinct conceptions. Conceivably, at least, it is possible for an



employe to have knowledge of a certain risk, when he enters the employment, and at the same time to exhibit a want of due care in entering it in view thereof. But it would seem that the decisions in the *Schlemmer* and *Mehnke* Cases are against treating such conduct as making out the defense of assumption of risk and not that of contributory negligence. It is only in case the employe, thereafter, in view of his knowledge of the risk, exhibits a want of due care in his behavior in relation thereto, that he has been guilty of such contributory negligence as to defeat the right of action. In such a case, assumption of risk and contributory negligence, but for a statute abolishing the one or limiting the effect of the other, coexist, each as a complete defense to the action. They need not, however, coexist. In the absence of statute, conceivably at least, there may be assumption of risk without contributory negligence. This is so, in case, at the time the employe enters the employment, he knows of the risk, and with such knowledge a prudent person would encounter the risk of entering the employment. So there may be contributory negligence without assumption of risk. This is the case where the employe in the course of his employment, with no previous knowledge of the risk, is suddenly confronted therewith and has no freedom of choice between quitting and continuing in the service, but fails to exercise due care in view of the risk with which he is thus confronted. So if a prudent person, under the circumstances of the particular case, would have discovered the existence of the risk and acted accordingly, a case of contributory negligence would be made out, but not assumption of risk. This is so because knowledge of the risk is essential to the defense and this does not exist. All that exists is that the employe ought to have known. In the case of *Texas & Pacific R. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, a switchman was injured whilst attempting to uncouple two cars delivered to defendant by another railroad company to be locally handled and then returned, by reason of the coupling apparatus being defective.

The court held that defendant owed plaintiff the duty of exercising due care to furnish him reasonably safe appliances in the way of coupling apparatus as to foreign cars delivered to it to be locally handled the same as in case they were delivered to be handled over its road. The defendant requested an instruction to the effect that, if plaintiff knew or by the exercise of ordinary care could have known that it was the custom of the defendant company not to inspect such cars, he assumed the risk of being injured by reason of the defects in such cars. The court struck out the words 'or by the exercise of ordinary care could have known' and gave the instruction thus altered. The action in so striking was approved. In the case of Choctaw, O. & G. R. Co. v. McDade, *supra*, the jury were instructed that if the deceased employe either knew of the danger of collision with the water spout, or, by the observance of ordinary care upon his part, ought to have known of it, no recovery could be had. Mr. Justice Day, as to this portion of the charge, said: 'The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employe.' The other proposition favoring plaintiff is that it does not follow from the fact that the plaintiff knew that pieces of slag of the size of a hen's egg and smaller were between the tracks in the yard at Oneida north of the road crossing and that it was dangerous for him to step on one of them in alighting from the train as he did, so that if he had been injured by stepping on such a piece he could not have recovered because he had assumed such risk, that he had assumed the risk of stepping on a loose piece of the character of that on which he did step. It seems to have been the thought of that portion of the charge to the jury as to what was essential to make out the defense of assumption of risk heretofore quoted that it did so fol-

low. Possibly there is no room to claim that a piece the size of a man's two fists or of a cocoanut is not substantially larger and more dangerous to step on under such circumstances than one only as large as a hen's egg. At least, it cannot, as a matter of law, be said that such is not the case. This being so, we must take it that it is substantially larger and more dangerous. And such being the case, it is not to be said that an employe who assumes a particular risk assumes a substantially greater one because it is exactly of the same kind, and that, even though such particular risk is an 'extraordinary' one, in that it arises from the employer's negligence, as is the case with the substantially greater one. Conceivably he might be willing to incur the one and not the other. Such fact cannot be made the basis of charging plaintiff with having assumed such risk on the ground that it was inferable from the presence of the smaller pieces that there might be larger ones or even that it was probable or likely there would be. The knowledge of conditions from which a risk arises which the doctrine calls for, as we understand it, is immediate knowledge obtained from pure observation. It does not cover conclusions or inferences from such knowledge. Probably it would be safer to say that it does not cover inferences or conclusions therefrom as to possible, or probable or likely conditions. In the Ponn Case, 191 Fed. 688, 112 C. C. A. 228, Judge Hollister said: 'The only kind of knowledge which, on the ground of assumption of risk, will bar a recovery is actual knowledge.' And in the Wright and Hamel Cases, 207 Fed. 285, 125 C. C. A. 25, and 207 Fed. 304, 125 C. C. A. 44, Judge Warrington characterized the assumption called for by the defense of assumption of risk as a 'conscious assumption;' and in order to be conscious assumption there must be actual knowledge. In the case of Chesapeake & Ohio Ry. Co. v. Deatley, 241 U. S. 310, 36 Sup. Ct. 564, 60 L. Ed. 1016, the plaintiff, a head brakeman, had been injured whilst attempting to mount, at the engine, a freight train in motion. By direction of the engineer he had dismounted at a coal dock, at which the train had stopped, and gone



forward to a signal tower a short distance ahead, for information. The attempt to mount was from the platform of the tower as the engine passed him. His employment required him to mount a moving train on proper occasions, and he had frequently mounted his train, whilst in motion, on such an occasion as this one. The mounting could be made with reasonable safety if the train was running at a moderate rate of speed. There was some risk in so mounting, but it was one of the ordinary risks of the employment, in that it did not arise from negligence of the defendant or its engineer. And this risk the plaintiff had assumed. The train in question was running at the rate of 12 miles an hour, and the claim was that this was an unusually dangerous rate of speed at which to mount the train, and that therefore the engineer was negligent in running it at that rate, which made the risk of mounting the train whilst it was so running an extraordinary risk. The principal question in the case was, accepting this to be true: Did the plaintiff assume the risk of such negligence on the part of the engineer? Possibly the case did not involve the doctrine of assumption of risk at all, in that plaintiff, when suddenly confronted with the increased risk, had no such freedom of choice, as to whether he would continue in or leave defendant's service, as is essential to call for the application of the doctrine, and therefore involved only the question of contributory negligence. But the case was disposed of on the basis that it did, and it was held that plaintiff did not, as a matter of law, assume such risk. It was so held because, the plaintiff not having admitted that he knew and appreciated the increased risk, it could not, as a matter of law, be said that he did; and this though there was no denial on his part that he did. The extraordinary risk which plaintiff thus encountered was exactly the same kind as the ordinary one which he had assumed. It was merely greater in degree. It was a risk which the engineer might easily create, and it was to be inferred that it was possible or even probable or likely that plaintiff would have to encounter it. This, however, was without



effect. Mr. Justice Pitney stated defendant's position thus: 'It is insisted that the true test is, not whether the employe did, in fact, know the speed of the train and appreciated the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger.' To this he responded: 'This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is, not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' But it may be urged that the smaller risk, to wit, that of running at such a moderate rate of speed that the train could be mounted with reasonable safety and, which was assumed, was an ordinary risk, in that it involved no negligence and the plaintiff had the right to presume that he would be subjected to no greater risk by running the train at a greater rate, whereas here the smaller risk, to wit, the presence, at the alighting place of pieces of slag the size of a hen's egg and smaller, was in itself an extraordinary risk, in that it involved negligence. They were dangerous to step on. Brakemen were known to alight at that place in the line of their duties. The pieces could have been removed and reasonably should. Thus knowing that defendant was negligent to this extent, plaintiff not only had no right to presume that it had not been also negligent in permitting larger and more dangerous pieces to be there, but reasonably should have inferred that it might have or probably or likely had been and if he was not willing to incur the risk should have quit the employment. In the case of *Texas & Pacific R. R. Co. v.*

Archibald, *supra*, though the only question directly involved was whether the words as to ordinary care were properly stricken out of the instruction requested by the defendant, it was held that the jury should not have been instructed that, if plaintiff knew of the custom not to inspect and repair foreign cars handled locally, he had assumed the risk of injury by the defective coupling apparatus which he encountered, as it was in the instruction in its altered form. It was negligence on defendant's part not so to do, and it was inferable therefrom that the coupling apparatus of cars so received by it possibly might, even probably or likely would be, defective, and yet plaintiff was not held to have assumed the risk of the presence of such defective apparatus because he knew of such negligence. A conclusive reason why the employe should not be chargeable with knowledge of defective conditions the possibility, probability, or likelihood of the existence of which is inferable from known conditions, is that the only basis for charging him with such knowledge is that an ordinarily prudent employe under like circumstances would draw such inference and act accordingly; and, as we have seen, the question of care on the employe's part has nothing whatever to do with the defense of assumption of risk. It has solely to do with that of contributory negligence."

**§ 562. Distinction Between Assumption of Risk and Contributory Negligence.** The distinction between assumption of risk and contributory negligence under the federal act is important for the reason that, except as to violations of federal statutes for the protection of employes, assumption of risk is an absolute defense and contributory negligence only reduces the damages.<sup>25</sup> As construed by the United States Supreme Court an em-

25. **Alabama.** Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611.  
**Arkansas.** St. Louis, I. M. & S. R. Co. v. Rodgers, 118 Ark. 263, 176 S. W. 696.

**Georgia.** Macon, D. & S. R. Co. v. Musgrove, 145 Ga. 647, 89 S. E. 767.

**Indiana.** Pittsburgh, C. C. & St. L. R. Co. v. Farmers' Trust &

ploye assumes the ordinary risks and hazards of his occupation and also those defects and risks which are known to him, or are plainly observable, although due to the master's negligence. Contributory negligence, on the other hand, is the omission of the employe to use those precautions for his own safety which ordinary prudence requires.<sup>26</sup> In an action under the Federal

Savings Co., 183 Ind. 287, 108 N. E. 108.

**Kansas.** *Spinden v. Atchison, T. & S. F. R. Co.*, 95 Kan. 474, 148 Pac. 747.

**Virginia.** *Chesapeake & O. R. Co. v. Meadows*, 119 Va. 33, 13 N. C. C. A. 376, 89 S. E. 244.

**Washington.** *Bolch v. Chicago, M. & St. P. R. Co.*, 90 Wash. 47, 155 Pac. 422.

"In considering the facts in this case we should keep in mind the distinction between the consequences of contributory negligence and assumption of risk. Under the federal Employers' Liability Act one is only barred from recovery where it appears that he assumed the risk incident to his employment. On the other hand, contributory negligence is not a bar to recovery, and can only be considered in ascertaining the extent to which damages are to be mitigated." *Southern R. Co. v. Mays*, 152 C. C. A. 91, 239 Fed. 41.

The doctrine of assumption of risk always arises on contract, express or implied, while the doctrine of contributory negligence always arises in tort. *St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman*, 150 C. C. A. 203, 237 Fed. 1.

"'Assumed risk' and 'contributory negligence' are sometimes loosely treated as synonymous. This, perhaps, for the reason that

the same act may constitute both assumed risk and contributory negligence. *Railway Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441. But there is a well-recognized distinction between assumed risk and contributory negligence. Contributory negligence implies fault or a breach of duty on the part of the injured party, either by doing or by failing to do something that a reasonably prudent man would not have done, or would not have failed to do, to avoid being injured under the same or similar circumstances. On the other hand, there is a certain amount of danger incident to many employment, which ordinary prudence cannot always avoid. Where these are known to the employe, they are assumed by him as an implied part of his contract of employment. An employe assumes the risk of those dangers known to him to be ordinarily incident to the labor which he has agreed to perform, or which are so obvious that a man of ordinary intelligence and prudence must necessarily be presumed to have learned of them in the ordinary course of his employment." *Gulf, C. & S. F. R. Co. v. Cooper*, — Tex. Civ. App. —, 191 S. W. 579.

26. *Schlemmer v. Buffalo, R. & P. R. Co.*, 220 U. S. 590, 55 L. Ed. 596, 31 Sup. Ct. 561.



Employers' Liability Act, the federal Supreme Court described the distinction in the following language: "And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employe, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible. The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employes, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employes."<sup>27</sup> Applying these principles in an action for a negligent injury to a section man struck by an engine, an instruction that if the plaintiff could with safety and reasonable convenience, have stepped off the track but by his own choice, was properly refused because it pertained to the conduct of the plaintiff and what he should have done to protect his safety considering his danger at the time, and did not cover the element of assumed risk but was more properly applicable to the defense of contributory negligence.<sup>28</sup>

**§ 563. When Assumption of Risk is not a Defense—Federal Safety Appliance Laws.** In an action for in-

27. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 334, L. R. A. 1915C 1,

Ann. Cas. 1915B 475.

28. *Erie R. Co. v. Purucker*, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629.



juries based upon a violation by a railroad company of any federal statute enacted for the safety of employes, such as the Federal Safety Appliance Act and Boiler Inspection Act, if it is shown that the injury is due to a violation of such federal statutory laws, the doctrine of assumption of risk is absolutely wiped out and is no defense whatever to an action under the federal act.<sup>23</sup>

29. *Erie R. Co. v. Purucker*, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629; *Baugham v. New York, P. & N. R. Co.*, 241 U. S. 237, 60 L. Ed. 977, 36 Sup. Ct. 592, 13 N. C. C. A. 138; *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. 482; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; *Cincinnati, N. O. & T. P. R. Co. v. Hall*, 155 C. C. A. 606, 243 Fed. 76; *St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman*, 150 C. C. A. 203, 237 Fed. 1; *Clark v. Erie R. Co.*, 230 Fed. 478; *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604; *Schweig v. Chicago, M. & St. P. R. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135.

**Alabama.** *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

**Georgia.** *Southern Ry. Co. v. Blackwell*, — Ga. App. —, 93 S. E. 321; *Atlantic Coast Line R. Co. v. Kennedy*, — Ga. App. —, 92 S. E. 973; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Kirbo v. Southern R. Co.*, 16 Ga. App. 49, 84 S. E. 491.

**Indiana.** *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —, 111 N. E. 653.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. York*, 176 Ky. 9, 194 S. W. 1034; *Louisville & N. R. Co. v. Williams' Adm'r*, 175 Ky.

679, 194 S. W. 920; *Jones v. Southern Ry. in Kentucky*, 175 Ky. 455, 194 S. W. 558; *Young v. Norfolk & W. R. Co.*, 171 Ky. 510, 188 S. W. 621; *Louisville, H. & St. L. R. Co., v. Wright*, 170 Ky. 230, 185 S. W. 861; *Louisville & N. R. Co. v. Patrick*, 167 Ky. 118, 180 S. W. 55; *Davis v. Chesapeake & O. R. Co.*, 166 Ky. 490, 179 S. W. 422; *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471; *Chesapeake & O. R. Co. v. De Atley*, 159 Ky. 687, 167 S. W. 933; *Glenn v. Cincinnati, N. O. & T. P. R. Co.*, 157 Ky. 453, 163 S. W. 461.

**Maryland.** *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

**Michigan.** *Gaines v. Grand Trunk R. Co. of Canada*, 193 Mich. 398, 159 N. W. 542.

**Minnesota.** *Clapper v. Dickinson*, 137 Minn. 415, 163 N. W. 752; *Thompson v. Minneapolis & St. L. R. Co.*, 133 Minn. 203, 158 N. W. 42; *Marshall v. Chicago, R. I. & P. R. Co.*, 131 Minn. 392, 155 N. W. 208; *La Mere v. Railway Transfer Co.*, 125 Minn. 526, 147 N. W. 1134; *Ahrens v. Chicago M. & St. P. R. Co.*, 121 Minn. 335, 141 N. W. 297.

**Missouri.** *Christy v. Wabash R. Co.*, 195 Mo. App. 232, 191 S. W. 241; *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787.

The language of section 4 of the act makes this proposition clear and it has been so construed by the courts without dissent.<sup>30</sup> Passing upon a requested instruction in an action for violation of the Safety Appliance Act which charged that if the plaintiff knew the defect and the risk arising therefrom, he could not recover, the Supreme Court of the United States in the Crockett case, said: "Upon the merits, we of course sustained the contention that by the Employers' Liability Act the defense of assumption of risk remains as at common law, saving in the cases mentioned in section 4, that is to say: 'Any case where the violation by

**Montana.** Sorenson v. Northern Pac. R. Co., 53 Mont. 268, 163 Pac. 560.

**Nebraska.** Huxoll v. Union Pac. R. Co., 99 Neb. 170, 155 N. W. 900.

**New Hampshire.** Castonia v. Maine Cent. R. Co., — N. H. —, 100 Atl. 60.

**New Jersey.** Parker v. Atlantic City R. Co., 87 N. J. L. 148, 93 Atl. 574.

**North Carolina.** Sears v. Atlantic Coast Line R. Co., 169 N. C. 446, 86 S. E. 176.

**Oklahoma.** Chicago, R. I. & P. R. Co., v. Jackson, — Okla. —, 160 Pac. 736; St. Louis & S. F. R. Co., v. Snowden, 48 Okla. 115, 149 Pac. 1083.

**Oregon.** Oberlin v. Oregon-Washington R. & Nav. Co., 71 Ore. 177, 142 Pac. 554.

**South Carolina.** Steele v. Atlantic Coast Line R. Co., 103 S. C. 102, 87 S. E. 639.

**South Dakota.** Lee v. Great Northern Ry. Co., — S. D. —, 163 N. W. 560.

**Texas.** Chicago, R. I. & G. Ry. Co. v. De Bord. — Tex. —, 192 S. W. 767; Gulf, C. & S. F. Ry. Co. v. Cooper, — Tex.

Civ. App. —, 191 S. W. 579.

**Virginia.** Norfolk & W. Ry. Co. v. Tucker's Adm'x, 120 Va. 540, 91 S. E. 614.

**Washington.** Swanson v. Oregon-Washington R. & Nav. Co., 92 Wash. 423, 159 Pac. 379; Bolch v. Chicago, M. & St. P. R. Co., 90 Wash. 47, 155 Pac. 422; Lauer v. Northern Pac. R. Co. 83, Wash. 465, 145 Pac. 606.

**West Virginia.** Hull v. Virginian R. Co., 78 W. Va. 25, 88 S. E. 1060.

**Wisconsin.** Hovaneck v. Great Northern R. Co., 165 Wis. 511, 162 N. W. 927; Smiegil v. Great Northern R. Co., 165 W. 57, 160 N. W. 1057.

If an employe of an interstate carrier is injured by reason of a violation of the Federal Boiler Inspection Act, assumption of risk is not a defense and his contributory negligence does not reduce his damages. Great Northern Ry. Co. v. Donaldson, 246 U. S. 121, 62 L. Ed. —, 38 Sup. Ct. 230.

30. Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897; Clark v. Erie R. Co., 230 Fed. 478.

such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.' ” If a failure to comply with federal safety appliance laws contributes “in whole or in part” to an injury, assumption of risk is not a defense.<sup>31</sup>

§ 564. **State Statutes for Safety of Employes not Included.** The provision of the statute which declares that no employe shall be held to have assumed the risk of his employment where the violation by the common carrier of any statute enacted for the safety of employes contributed to the injury or death, refers only to federal statutes and does not include state statutes enacted for the safety of employes. In the early enforcement of the federal act a few courts held that the clause “any statute enacted for the safety of employes” included state statutes as well as federal. If these rulings had been followed, then assumption of risk under the national law would have been an absolute defense to the same acts in some states, and not in others, thus destroying the uniformity of the applicability of the federal law throughout the nation. Such a contention was condemned by the Supreme Court of the United States in the following language:<sup>32</sup> “By the phrase ‘any statute enacted for the safety of employes,’ Congress evidently intended federal statutes, such as the Safety Appliance Acts (March 2, 1893, c. 196, 27 Stat. 531, March 2, 1903, c. 976, 32 Stat. 943, April 14, 1910, cp. 160, 36 Stat. 298, February 17, 1911, c. 103, 36 Stat. 913,) and the Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415.) For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employes in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of

31. *Union Pac. R. Co. v. Hux-  
oll*, 245 U. S. 535, 62 L. Ed. 38  
Sup Ct. 187.

32. *Seaboard Air Line R. Co.*

*v. Horton*, 233 U. S. 492, 58 L.  
Ed. 1062, 34 Sup. Ct. 635, 8 N.  
C. C. A. 834, L. R. A. 1915C 1,  
Ann Cas. 1915B 475.

contributory negligence and assumption of risk, by enacting statutes for the safety of employes, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.<sup>'733</sup>

**§ 565. Assumption of Risk Eliminated in Actions for Violation of Hours of Service Act.** In an action under the federal act for an injury to an employe within its terms, if the injury or death is caused by a violation of the Federal Hours of Service Act,<sup>34</sup> assumption of risk is not a defense to the action.<sup>35</sup> But the unjustified retention of an employe at his work in violation of the Hours of Service Act does not deprive the carrier of the defense of assumption of risk unless the breach of the statute contributes to the injury.<sup>36</sup> "In this case there was evidence that whether technically on duty or not, the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours, and that, as a physical fact, it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liability Act, secs. 3 and 4, questions of negligence and assumption of risk disappear."<sup>37</sup>

**§ 566. Confusing Assumption of Risk with Contributory Negligence in Jury Instructions Under Federal Act.** The supreme court of appeals of Virginia<sup>38</sup>

33. Accord: *Columbia & P. S. R. Co. v. Sauter*, 139 C. C. A. 150, 223 Fed. 604; *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767.

34. Hours of Service Act, March 4, 1907, c. 2939, 34 Stat. 1415.

35. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. Ed. 312, 37 Sup. Ct. 123; *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, 60 L. Ed. 317, 36 Sup.

Ct. 121, 10 N. C. C. A. 778; *Schweig v. Chicago, M. & St. P. R. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135.

36. *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, 60 L. Ed. 317, 36 Sup. Ct. 121, 10 N. C. C. A. 778.

37. *Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. Ed. 312, 37 Sup. Ct. 123.

38. *Southern R. Co. v. Jacobs*, 116 Va. 189, 81 S. E. 99.



analyzed and reviewed many decisions of the national and state courts discussing and applying the doctrine of assumption of risk under the federal act.<sup>39</sup> In the Jacobs case, the question before the court was whether a railroad brakeman assumed the risk of injury from a pile of cinders negligently permitted to accumulate alongside of the track in a railroad yard which the jury found, under the instructions of the court, constituted a defect or insufficiency due to the negligence of the company. Over the objections of the railroad company, on the question of assumption of risk, the court instructed the jury as follows: "The court further instructs the jury that knowledge by the plaintiff of the unsafe character or condition of the said roadway is of itself no defense to an action for an injury caused to him thereby. Such knowledge, however, if the jury believe from the evidence that he had such knowledge, may be considered by the jury along with all the evidence in the case in determining whether the plaintiff was himself guilty of negligence which contributed to produce the injury mentioned in the declaration, but the fact that the plaintiff may himself have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished in proportion to the amount of contributory negligence, if such there were, which they may believe from the evidence was attributable to said plaintiff under the circumstances." The defendant, on the other hand, request was denied by the trial court: "A. The court

39. The cases cited, analyzed and discussed, were the following: Seaboard Air Line Ry. v. Moore, 228 U. S. 433, 57 L. Ed. 907, 33 Sup. Ct. 580; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. 426, 3 N. C. C. A. 806; Mondou v. New York, N. H. & H. R. Co., 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169, 1 N. C. C. A. 875, 38 L. R. A. (N. S.) 44; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1,

51 L. Ed. 681, 27 Sup. Ct. 407; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. 24; Texas, & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. 777; Central Vermont R. Co. v. Bethune, 124 C. C. A. 528, 206 Fed. 868; Barker v. Kansas City, M. & O. R. Co., 88 Kan. 767, 43 L. R. A. (N. S.) 1121; 129 Pac. 1151; Freeman v. Powell, (Tex. Civ. App.), 144 S. W. 1033.

instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working on the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witness for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the Act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant." The court held that, under the facts, the defendant's refused instruction should have been given and that it was error to give plaintiff's second instruction for the reason that under the federal statute assumption of risk is an absolute defense as at common law, the court holding that an employe assumes the risk of injury from defective appliances furnished by his employer only when the defect is known to, or plainly observable by, the employe. Reviewing the cases cited in the preceding note, the court said: "Cases might be multiplied to any extent to show that the doctrine of assumed risks covers more than those risks which are ordinarily incident to the business, and embraces the use of defective appliances and work of almost every description where the employe with knowledge of the defect, continues to use it without notice to the employer."

**§ 567. When Assumption of Risk is no Defense When there is a Plurality of Causes.** Where the injury to an employe is due to two acts contributing as proximate causes, notwithstanding the fact that the employe assumes the risk from one of these causes, assumption of risk is no defense to the action if the other proximate cause is one for which the master is liable and is not an ordinary risk of the employment

or one of which the employe has no constructive or actual knowledge.<sup>40</sup>

**§ 568. Violations of Rules not Assumption of Risk.** In an action under the federal act, the defendant pleaded in its answer that the plaintiff had contributed to his own injury by violating one of its rules governing employes and that he therefore assumed the risk. The court held that such a fact, even if proven, did not show assumption of risk for the reason that such a defense is referable to contributory negligence and not to assumption of risk.<sup>41</sup>

**§ 569. Concrete Instruction must be Given, if Requested.** In instructing the jury on the question of assumption of risk a concrete instruction applicable to the phase of the evidence should be given; and the court should not couch the instruction in such general and sweeping language that it is not calculated to give the jury an accurate understanding of the law upon the subject.<sup>42</sup> In an action under the federal act, the plaintiff, an engineer, was injured by the explosion of a water glass on which the gauge was missing. The United States Supreme Court held that the state trial court committed reversible error in refusing to give the following instruction: "If you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily

40. Northern Pac. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1.

41. Macon, D. & S. R. Co. v. Musgrove, 145 Ga. 647, 89 S. E. 767; Oberlin v. Oregon Washington R. & Nav. Co., 71 Ore. 177,

142 Pac. 554; Carter v. Kansas City Southern Ry. Co., — Tex. Civ. App. —, 155 S. W. 638.

42. Norfolk & W. R. Co. v. Earnest 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172.

assumed the risk incident to such use.”<sup>43</sup> But in an action for a negligent injury to a section man who was struck by an engine, an instruction that if the jury found that the plaintiff voluntarily, for his own convenience, went along using the track, was properly refused for the reason that it omitted elements essential to make assumption of risk applicable to the case in that it failed to call attention to the circumstances under which the testimony tended to show that plaintiff was using the tracks at the time and the knowledge of conditions which should have been taken into consideration in order to attribute assumption of risk to him, and failed to take into account the testimony that the engine ran without signals or warning to him.<sup>44</sup>

**§ 570. Failure to Instruct on Assumption of Risk not Error when Defendant has not Been Prejudiced Thereby.** A judgment against a common carrier by railroad under the Federal Act should not be reversed for the failure of a trial court to instruct on assumption of risk even when there is evidence justifying a charge upon that subject if the defendant has not been prejudiced thereby.<sup>45</sup> Thus, in the case cited, the defendant requested the trial court to instruct the jury that if the decedent knew of the presence of a piece of timber over the track and knew that it would not clear a man standing on top of a box car, and with such knowledge continued in the service of the company, then he must be held to have assumed the risk of being injured by being struck by the piece of timber. The refusal of

43. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann Cas. 1915B 475.

44. *Erie R. Co. v. Purucker*, 244 U. S. 320, 61 L. Ed. 1166, 37 Sup. Ct. 629. Said the court: “Under such circumstances the injured man would not assume the risk attributable to the negli-

gent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it.”

45. *Kanawah & M. R. Co. v. Kerse*, 239 U. S. 576, 60 L. Ed. 448, 36 Sup. Ct. 174.



this request was held to be error, but as the jury, by specific findings of fact, negatived the hypothesis upon which the instruction was based, that is, in response to particular interrogatories submitted by the court, found that the decedent did not know that the piece of timber was stretched over the track, the error did not result in a reversal of the judgment as the carrier was not prejudiced thereby.

§ 571. **Burden of Proving Assumption of Risk upon Defendant.** The defense of assumption of risk is affirmative in character. The plaintiff is not required to negative it in his petition in order to make a *prima facie* case, and the burden of proving that an employe assumed the risk is upon the defendant.<sup>46</sup>

§ 572. **Defense of Assumption of Risk Must Be Pleaded to be Available.** Unless from all the evidence introduced by the plaintiff in an action under the federal act, the court can conclude as a matter of law that the plaintiff assumed the risk, the defense of assumption of risk is not available to a defendant in an action under the statute unless pleaded in the answer.<sup>47</sup> In the Vickery case, cited in the notes, defendant insisted that the plaintiff had assumed the risk of a switch stand being erected too close to a railroad track without a warning light. To this contention the court said: "The risk here complained of arose, as

46. *Kenyon v. Illinois Cent. R. Co.*, 173 Iowa 484, 155 N. W. 810; *Falyk v. Pennsylvania R. Co.*, 256 Pa. 397, 100 Atl. 961.

47. *Alabama Great Southern R. Co. v. Skotzy*, 196 Ala. 25, 71 So. 335; *Vickery v. New London Northern R. Co.*, 87 Conn. 634, 89 Atl. 277; *Phillips v. Union Pac. R. Co.*, 100 Neb. 157, 158 N. W. 966; *Lloyd v. Southern Ry. Co.*, 166 N. C. 24, 7 N. C. C. A. 520, 81 S. E. 1003.

"The burden of proof on this question of assumption of risk is on the defendant, and not on the plaintiff, and unless the evidence tending to show it is clear and from unimpeached witnesses, and free from contradiction, the trial court cannot be charged with error in refusing to take the question from the jury." *Robie v. Boston & M. R. R.* — Vt. —, 100 Atl. 925.

alleged, from the negligent erection of a switch stand in dangerous proximity to one of the tracks in the railroad yard and the negligent failure to have a warning light upon it. This was not a risk ordinarily incident to the railroad service in which the plaintiff as a brakeman was employed but one arising from the defendant's negligence. The plaintiff may have known of it and have voluntarily assumed it but he did not do so by entering into his employment. If such was the fact, it was incumbent upon the defendant to plead and prove." Following a local rule of pleading which required a servant in actions against the master for personal injuries to negative assumption of risk in his complaint,<sup>48</sup> an appellate court of Indiana held that the plaintiff in an action under the federal act must, in his petition, allege that he did not have full knowledge of the conditions which he charges constituted negligence on the part of his employer.<sup>49</sup> The correctness of the ruling of the court in this case is doubtful. While matters of pleading and practice under the federal act must be determined by the laws of the forum, yet a substantive right under the federal act cannot be defeated by a rule of practice.<sup>50</sup>

**§ 573. Cases in which Interstate Employes were Held to Have Assumed the Risk.** Employes engaged in interstate commerce were held by the courts to have no remedy under the federal act because of assumption of risk, under the following circumstances: an engineer while his train was moving, climbed on top of the coal in the tender to ascertain the amount of water in the tank by looking through a man hole at the rear end of the tender, and while returning, came in contact with an

48. *Indianapolis & G. Rapid Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *Ames v. Lake Shore & M. S. Ry. Co.*, 135 Ind. 363, 35 N. E. 117.

49. *Cincinnati, H. & D. Ry. Co. v. Gross*, — Ind. App. —, 111 N. E. 653.

50. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252.

electric wire attached to an overhead bridge. He was instantly killed by the electric current. This wire was suspended over the center line of the tracks upon which the train was traveling and was used for the operation of trains by electricity. Passenger trains had been operated on this road for several years by electricity. The method for electrical operation was that known as the overhead system. The equipment required for this method consisted in part of steel structures by the side of and across the tracks for the support of wires running along the center lines of the rails. These wires were suspended at standard height, which was 22½ feet above the level of the top of the rails, but where there were overhead bridges it was necessary to depress them at those places. The court held, in an action under the federal act, for the death of the engineer, that the decedent assumed the risk and that there could be no recovery.<sup>51</sup> In so holding that the decedent had assumed the risk, the court said: "As bearing upon the question of the intestate's assumption of the risk which caused his death, the pertinent facts lie outside of the realm of dispute or uncertainty. They show that Bottomley had full knowledge of all the physical factors in the situation. As an engineer, he was familiar with engines and tenders and their proportions. The engine he was driving was one of moderate size, and of a type long in use. Its tender, whether of the large or smaller size, was one in use with this type of engine. It was neither special nor unusual. In his years of experience, for the most part confined to this section of the road, and his recent months of frequent service upon it, as engineer, he must have become acquainted with the existence of the many overhead bridges which here span the tracks, with the narrow space between bridges and tops of engine and tender, and with the manner in which the electric service wires were strung in carrying them under the bridges. These conditions

51. *Farley v. New York, N. H. & H. R. Co.*, 87 Conn. 328, 87 Atl. 990.

were apparent to casual observation; they had remained unchanged for years; and they were closely related to the performance of his duties. He must also have known that these wires were electrically charged for the operation of trains. As a locomotive engineer of experience living in this age of the world, he, untold and unwarned, must have been sufficiently intelligent and informed to know of the latent danger which lurked in the wires so charged to one who should come into contact with them or into their immediate vicinity, and of the extremity of that danger. But that matter aside, the knowledge of the danger had been so directly and forcibly brought home to him through the notices and warnings given to him by the defendant that he could not have failed both to know the danger to his life that there would be in permitting himself to come into contact with or near to one of the wires, and to comprehend the character and extent of that danger. This being so, he certainly knew and comprehended the risk incident to his employment. No one could well be expected to have better knowledge or a more adequate appreciation. Possessed of this knowledge and appreciation, he had for years chosen to continue in his employment. By so doing he assumed its risk, which, during these years, had remained unchanged, and been unenhanced by any new act of the defendant which could by possibility be imputed to it as negligence.” A railroad special agent stepped in between two cars of a train in a terminal yard without the knowledge of the trainmen in charge of the train. The court held that he assumed the risk of an injury from the movement of the train.<sup>52</sup> An engineer who knew that the gauge of the water glass on his engine was missing and with such knowledge continued to work without complaint, was held to have assumed the risk.<sup>53</sup> A sec-

52. *Helm v. Cincinnati, N. O. & T. P. R. Co.*, 156 Ky. 240, 160 S. W. 945.

53. *Seaboard Air Line R. Co.*

*v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475.



tion laborer was engaged in removing 60-pound rails and substituting 100-pounds rails on a switch track. The heavy rails had been deposited near the tracks a few days before the injury. One of these rails was carried to the track and laid down. The second rail was then carried to the tracks. A foreman was in charge of the work and the plaintiff was a member of the crew. When the crew reached the track some one of the crew gave the signal to throw the rail. When the rail was thrown, it rebounded and struck and injured plaintiff. There was some evidence to the effect that the rail brace which was used for the purpose of keeping the 60-pound rail in position was not moved when the 60-pound rail was taken up and that the heavier rail, when thrown, struck the rail brace and this caused the rail to rebound. There was also evidence that the safer way to handle the rails was by use of rail tongs but it did not appear that such tongs were being used during the time of plaintiff's employment. The usual and customary way of moving the rails from one place to another was that adopted in handling the rail in question. The section crew picked it up with their hands, carried it to the place where it was needed and then, at the word of some member of the crew, dropped it on the ground. The plaintiff knew of the presence of the ties and of the presence of the rail brace. Under these facts the court said: "As the plaintiff's claim does not grow out of a violation of such a statute (national safety statutes) the doctrine of assumed risk applies. Under that doctrine, the employe assumes those risks which are known to or are clearly observable by him. There was nothing complicated about the character of the work. The operation was simple. The brace and ties were clearly observable by the plaintiff. It is not insisted that the rail was dropped or thrown in a negligent manner. Being dropped without negligence, the danger of being struck by it was one of the risks ordinarily and usually incident to the employment, and therefore

one which plaintiff assumed.”<sup>54</sup> Decedent was a boiler maker helper and came to his death in the machine shops of a railroad company. In these shops were a number of tracks and between these tracks were what are known as “drop pits,” nine feet deep and about 16 feet long which were used when large driving wheels were taken off of locomotives. The pit was used so as to avoid the necessity of jacking up the locomotive and so that the driving wheels could be dropped into the pit. There was a cover over about one-third of this pit at either end but no cover over about one-third of it in the center. An engine was not placed over this pit unless the wheels were to be taken off. Decedent had been working in the shops for some time and understood the premises perfectly. The decedent was found at the bottom of the pit under circumstances showing that he fell into it, his head having struck against the concrete bottom and this caused his death. The accident occurred after dark. There were lights in the shop but the proof tended to show that these lights did not shine upon the drop pit and did not sufficiently illuminate it. There were no barriers around the pit and no cover over one-third of it. The drop pit was only a few feet from where the decedent had been working all day and he knew where it was. On these facts the trial court sustained a demurrer to the evidence on the ground of assumption of risk in a suit under the Federal Employers’ Liability Act and the court’s action was sustained by the court of appeals.<sup>55</sup> A railroad employe who worked 54 out of 57 hours for an interstate railroad company in assisting to water and feed cattle in transit unloaded for feed, rest and water, assumed the risk of injury due to a fall from a switch engine claimed to have been caused by his exhausted con-

54. *Truesdell v. Chesapeake & O. R. Co.*, 159 Ky. 718, 169 S. W. 471. Under quite similar facts, Judge Trimble of the Kansas City Court of Appeals reached the same conclusion of non-liability on other grounds. *Neth v. Delano*, 184 Mo. App. 652, 171 S. W. 1.

55. *Glenn v. Cincinnati, N. O. & T. P. R. Co.*, 157 Ky. 453, 163 S. W. 461.

dition, as he knew better than anyone else his condition as to whether he was taking any risks in continuing to work under such circumstances.<sup>56</sup>

§ 574. **Cases in which Interstate Employees were Held not to have Assumed the Risk.** Railroad employees engaged in interstate commerce were held in actions under the federal act not to have assumed the risk under the following facts. Decedent, while engaged in cleaning snow from the tracks of a railway company when there was mist, smoke and some snow, was killed by a train bound from New York to Philadelphia. At the place of the accident there were four main lines of trackage. Shortly after 9:00 o'clock in the morning the men working with plaintiff were warned to step off track No. 4 by the call of the foreman in order to let a local train by. The decedent and two others were working on track 2. There was no call to them, the practice of the foreman being to designate the track in his warning, the men on the other track continuing to work. The New York train struck the decedent while he was working on track No. 2 and it approached without any signal or warning. The local train was slow and the New York train came fast and while the men were attracted by the first, the other rushed upon them. The defendant produced testimony in conflict with these facts shown by the plaintiff. Speaking of the legal effect of this evidence on the question of assumption of risk, Mr. Justice McKenna, for the court, said: "It is hence contended by the railway company that McGovern assumed the risk of the situation and that, therefore, it was error for the district court to refuse to give an instruction which presented that contention. We have given the testimony in general outline, but enough to show that what conflict there was in it was for the jury to judge and what deductions there were to be made from it were for

56. *Schweig v. Chicago, M. & St. P. R. Co.*, 132 C. C. A. 660, 216 Fed. 750, 7 N. C. C. A. 135, aff'g 205 Fed. 96.

the jury to make. And the district court, being of this view, refused to charge the jury, as we have seen, that McGovern had assumed the risk of the situation. We cannot say that as a matter of law the court was mistaken.<sup>57</sup> In another case the Supreme Court again held that a deceased employe did not assume the risk under the circumstances hereinafter detailed.<sup>58</sup> The decedent was an engineer on a freight train proceeding southward on a lead track in a railroad yard. Ahead of him were some cars on a yard track. While visible to the engineer from the right side they became more and more invisible as the train advanced. The engineer asked the fireman, who was on the left side of the engine and in full view of the cars, whether they were clear of the lead track and was answered that they were. There was a dispute as to whether a head brakeman was riding in the cab and whether he called the engineer's attention to the fact that the coal cars were not in the clear. But there was no dispute that the engineer again asked the fireman, who answered that the cars were not clear and jumped from the locomotive. The engineer shut off his power and stepped to the left side, where, from the collision which immediately resulted, he was injured and died. Concerning these facts, the court in denying that as a matter of

57. *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. Ed. 283, 35 Sup. Ct. 127, 8 N. C. C. A. 67.

58. *Yazoo & M. V. R. Co. v. Wright*, 235 U. S. 376, 59 L. Ed. 277, 35 Sup. Ct. 130, aff'g 125 C. C. A. 25, 207 Fed. 281, 197 Fed. 94. In this case the Supreme Court ignored the rule as to assumption of risk announced by Judge McCall, the trial judge, to the effect that the employe does not in any case assume the risk due to the master's negligence (See section 554, *supra*); but the court held that, on the facts, it

would not declare as a matter of law that the engineer knew of the danger or must be presumed to have known of it. The cases holding that an employe assumes the risk due to the master's negligence when the defect and danger arising from it, is known or is plainly observable, and then continues in the employment without complaint, were cited by the court with approval. See section 555, *supra*; *Gila Valley G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 34 Sup. Ct. 229, aff'g 13 Ariz. 170, 1 N. C. C. A. 362, 112 Pac. 845.



law the decedent had assumed the risk, said: "What ever may be the difficulty of distinguishing in many cases between the application of the doctrine of assumption of risk and the principles of contributory negligence, that there is no such difficulty here is apparent since the facts as stated above absolutely preclude all inference that the engineer knew or from the facts shown must be presumed to have known that the coal cars were protruding over the track on which he was moving and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train." The court in this case cited with approval several of its former opinions in which the assumption of risk was discussed and these cases are given in the notes.<sup>59</sup> A switchman was jarred from the narrow rim of the pilot of a "road" engine while it was being used at night in the yards as a switch engine. The court held that whether he assumed the risk was a question for the jury.<sup>60</sup> A brakeman in the nighttime was ordered by the yard master to couple up an air hose between two cars and it was necessary to do this by hand. The brakeman was required to step within the tracks and attach the two ends of the air hose together. While so at work he was struck by the car to which he had been ordered to couple and this was caused by other cars being negligently "kicked" against it by other employes. The court held that the plaintiff did not assume the risk.<sup>61</sup> A freight conductor did

59. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C L. Ann. Cas. 1915B 475; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. Ed. 681, 27 Sup. Ct. 407; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. Ed. 96, 24 Sup. Ct. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Behymer, 189 U. S. 468, 47 L.

Ed. 905, 23 Sup. Ct. 622, 13 Am. Neg. Rep. 695; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. 777, 4 Am. Neg. Rep. 746; Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451, 40 L. Ed. 766, 16 Sup. Ct. 618.

60. Louisville & N. R. Co. v. Lankford, 126 C. C. A. 247, 209 Fed. 321.

61. Chesapeake & O. R. Co. v. Proffit 134 C. C. A. 37, 218 Fed.

not assume the risk of the negligence of a flagman working under him who failed to protect the rear of the train.<sup>62</sup> A railway employe who had been working only three or four days on a three-wheeled gasoline car did not assume the risk from a defective flange on the wheel of the car of which he was ignorant and it did not appear to be a part of his duty to inspect the wheel or to look after its condition.<sup>63</sup> An employe of a railroad company who was injured in a collision did not assume the risk of an injury from the negligence of a railroad company in permitting the engine to be used in pulling a train which leaked steam so that the engineer could not see a train ahead of him.<sup>64</sup> A track laborer repairing a switch at night in the terminal yards of a railroad company did not assume the risk of injury due to the negligence of the company in causing cars to be upon the track on which he worked under their own momentum and without any warning or signal.<sup>65</sup> An employe injured by striking an unlighted switch stand too close to the track did not assume the risk of injury therefrom.<sup>66</sup> A section man who was hurt while assisting an employe in taking a motor car off of a railroad track in order to allow a train to pass did not assume the risk of injury on account of an insufficient number of men to assist him as he had no time to deliberate and determine whether the car could be taken off the track by two men with safety.<sup>67</sup> A brakeman injured because of a defective fastening in a car door, did not assume the risk of injury therefrom,

62. *Pennsylvania R. Co. v. Goughnour*, 126 C. C. A. 39, 208 Fed. 961.

63. *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 58 L. Ed. 521, 34 Sup. Ct. 229, aff'g 13 Ariz. 270, 1 N. C. C. A. 362, 112 Pac. 845.

64. *Niles v. Central Vermont R. Co.*, 87 Vt. 356, 89 Atl. 629.

65. *Colasurdo v. Central R. R. of New Jersey*, 180 Fed. 832; s. c. 113 C. C. A. 379, 192 Fed. 901.

66. *Vickery v. New London Northern R. Co.*, 87 Conn. 634, 89 Atl. 277.

67. *Missouri, K & T. Ry. Co. of Texas v. Freeman*, — Tex. —, 168 S. W. 69.

it was held, for the reason that there was no evidence that he knew of the defect or could have known of it by exercising ordinary care.<sup>68</sup>

68. Carter v. Kansas City Southern Ry. Co., — Tex. Civ. App. —, 155 S. W. 638.

## CHAPTER XXIX.

### CONTRIBUTORY NEGLIGENCE UNDER LIABILITY ACT.

- Sec. 575. The Statutory Provision.
- Sec. 576. Contributory Negligence Defined.
- Sec. 577. Right of Recovery under Federal Act not Barred by Contributory Negligence.
- Sec. 578. Two Theories of Comparative Negligence Extant in United States.
- Sec. 579. Purpose of Congress in Modifying Common Law Rule of Contributory Negligence.
- Sec. 580. Apportionment of Damages under Federal Act Different from Georgia Statute.
- Sec. 581. Employee's Contributory Negligence to Reduce Damages must Proximately Contribute to Injury.
- Sec. 582. Gross Negligence of Plaintiff and Slight Negligence of Defendant Cannot Defeat Recovery.
- Sec. 583. When Defendant's Act is no Part of Causation, Plaintiff Cannot Recover.
- Sec. 584. How Damages Apportioned When Employee is Guilty of Contributory Negligence.
- Sec. 585. When Duty of Trial Court to Instruct on Contributory Negligence Arises under Federal Act.
- Sec. 586. Method of Instructing the Jury When there is Evidence of Contributory Negligence.
- Sec. 587. Instruction on Contributory Negligence in Language of Statute not Erroneous.
- Sec. 588. Erroneous Instructions on Contributory Negligence Under the Federal Act.
- Sec. 589. When Contributory Negligence of Employee Does not Diminish Damages—Federal Safety Appliance Laws.
- Sec. 590. Burden is Upon Defendant to Prove Contributory Negligence
- Sec. 591. Whether Contributory Negligence Must be Pleaded, Determined by State Law.
- Sec. 592. Evidence of Contributory Negligence Admissible Under General Denial, When.

§ 575. **The Statutory Provision.** Section 3 of the Federal Employers' Liability Act provides that in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not



bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe.

§ 576. **Contributory Negligence Defined.** Contributory negligence under the Federal Employers' Liability Act has been defined by the United States Supreme Court in the following language: "Contributory negligence involves the motion of some fault or breach of duty on the part of the employe, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employes in similar circumstances would use".<sup>1</sup> In another case before the Supreme Court of the United States, the following definition of contributory negligence was approved: "Contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury".<sup>2</sup>

§ 577. **Right of Recovery under Federal Act not Barred by Contributory Negligence.** When an employe of a common carrier by railroad is injured or killed under the conditions prescribed in the federal act, that is, while the carrier is engaged and while the servant is employed by it in interstate commerce, in any action for damages for such injuries due to negligence, the right to recover cannot be defeated by showing or

1. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

2. Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172.

proving that the employee's negligence contributed in any degree to his injuries.<sup>3</sup> In this respect the statute

3. **United States.** *Kansas City Southern R. Co. v. Jones*, 241 U. S. 181, 60 L. Ed. 943, 36 Sup. Ct. 513; *Norfolk Southern R. Co. v. Ferebee*, 238 U. S. 269, 59 L. Ed. 1303, 35 Sup. Ct. 781; *Seaboard Air Line R. Co. v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172; *Southern R. Co. v. Mays*, 152 C. C. A. 91, 239 Fed. 41; *Pennsylvania Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901.

**Alabama.** *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960; *Southern Ry. Co. v. Fisher*, — Ala. —, 74 So. 580; *Southern R. Co. v. Peters*, 194 Ala. 69 So. 611.

**Arizona.** *Arizona Eastern R. Co. v. Bryan*, 18 Ariz. 106, 157 Pac. 376.

**Arkansas.** *St. Louis, I. M. & S. R. Co. v. Rodgers*, 118 Ark. 263, 176 S. W. 696.

**California.** *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148, 162 Pac. 111.

**Connecticut.** *Hubert v. New York, N. H. & H. R. Co.*, 90 Conn. 261, 96 Atl. 967.

**Georgia.** *Southern Ry. Co. v. Blackwell*, — Ga. App. —, 93 S. E. 321; *Charleston & W. C. R. Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 275; *Charleston & W. C. R. Co. v. Brown*, 13 Ga. App. 744, 79 S. E. 932; *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

**Idaho.** *Neil v. Idaho & W. N. R. Co.*, 22 Idaho 74, 125 Pac. 331.

**Illinois.** *Roberts v. Cleveland,*

*C., C. & St. L. R. Co.*, 279 Ill. 493, 117 S. E. 97.

**Indiana.** *Grand Trunk Western Ry. Co. v. Thrift Trust Co.*, — Ind. App. —, 115 N. E. 685; *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962; *Pittsburg, C., C. & St. L. R. Co. v. Farmers' Trust & Savings Co.*, 183 Ind. 287, 108 N. E. 108.

**Iowa.** *Kenyon v. Illinois Cent. R. Co.*, 173 Iowa 484, 155 N. W. 810; *Byram v. Illinois Cent. R. Co.*, 172 Iowa 631, 154 N. W. 1006.

**Kansas.** *Saar v. Atchison, T. & S. F. R. Co.*, 97 Kan. 441, 155 Pac. 954; *Duggan v. Missouri Pac. R. Co.*, 96 Kan. 249, 150 Pac. 557; *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 Pac. 759.

**Kentucky.** *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786; *Chesapeake & O. R. Co. v. Cooper*, 168 Ky. 137, 181 S. W. 933; *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329.

**Louisiana.** *Jones v. Kansas City Southern R. Co.*, 137 L. 178, 68 So. 401.

**Maryland.** *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

**Minnesota.** *Wiles v. Great Northern R. Co.*, 125 Minn. 348, 5 N. C. C. C. A. 60, 147 N. W. 427; *La Mere v. Railway Transfer Co. of City of Minneapolis*, 125 Minn. 159, 145 N. W. 1068; *McDonald v. Railway Transfer Co. of City of Minneapolis*, 121 Minn. 273, 141 N. W. 177.

**Missouri.** *Klippenbrock v. Wabash R. Co.*, 270 Mo. 479, 194 S. W. 50; *Yoakuf v. Lusk*, — Mo.

is a radical departure from the common law doctrine.<sup>4</sup> In all actions under the federal act the employe's contributory negligence merely diminishes the amount of his damages except in cases where the injury is due to a violation of federal safety statutes.<sup>5</sup> "This statute

App. —, 193 S. W. 635; Winslow v. Missouri, K. & T. Ry. Co. (Mo. App.), 192 S. W. 121; Brightwell v. Lusk, 194 Mo. App. 643, 189 S. W. 413; Koukouris v. Union Pac. R. Co., 193 Mo. App. 495, 186 S. W. 545; Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202, 177 S. W. 1127; Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106, 8 N. C. C. A. 538, Ann. Cas. 1916B 147, 172 S. W. 340; Pankey v. Atchison, T. & S. F. R. Co., 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.

**Nebraska.** Huxoll v. Union Pac. R. Co., 99 Neb. 170, 155 N. W. 900.

**New York.** McAuliffe v. New York Cent. & H. River R. Co., 172 N. Y. App. Div. 597, 158 N. Y. Supp. 922; Gee v. Lehigh Valley R. Co., 163 N. Y. App. Div. 274, 148 N. Y. Supp. 882.

**North Carolina.** Horton v. Seaboard Air Line R. Co., 169 N. C. 108, 85 S. E. 218.

**North Dakota.** Manson v. Great Northern R. Co., 31 N. D. 643, 155 N. W. 32.

**Pennsylvania.** Falyk v. Pennsylvania R. Co., 256 Pa. 397, 100 Atl. 961.

**Texas.** Gulf, C. & S. F. Ry. Co. v. Cooper, — Tex. Civ. App. —, 191 S. W. 579; Kansas City, M. & O. Ry. Co. v. Finke, — Tex. Civ. App. —, 190 S. W. 1143; Missouri, K. & T. Ry. Co. v. Pace, — Tex. Civ. App. —, 184 S. W. 1051; Chicago, R. I. & G. Ry. Co. v. Cosio, — Tex.

Civ. App. —, 182 S. W. 83; Texas & P. Ry. Co. v. White, — Tex. Civ. App. —, 177 S. W. 1185.

**Vermont.** Robie v. Boston & M. R. R., — Vt. —, 100 Atl. 925.

**Virginia.** Chesapeake & O. R. Co. v. Meadows, 119 Va. 423, 89 S. E. 244.

4. Seaboard Air Line Ry. Co. v. Tilghman, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653.

If the defendant's negligence proximately caused the injury but the plaintiff was also at fault, his damages are to be diminished in proportion that the gravity of his own fault bears to the entire causal negligence attributable to both. O'Neill v. Erie R. Co., — App. Div. —, 169 N. Y. Supp. 1008.

5. **United States.** Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172; St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman, 150 C. C. A. 203, 237 Fed. 1; Southern R. Co. v. Smith, 131 C. C. A. 238, 214 Fed. 942; Louisville & N. R. Co. v. Wene, 121 C. C. A. 245, 202 Fed. 887; Cain v. Southern Ry. Co., 199 Fed. 211; Colasurdo v. Central R. R. Co. of New Jersey, 180 Fed. 832; Kelly v. Great Northern Ry. Co., 152 Fed. 211.

**Alabama.** Southern Ry. Co. v. Fisher, — Ala. —, 74 So. 580;

rejects the common law rule and adopts another, deemed more reasonable, by declaring (sec. 3), 'the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.' This is followed by a proviso to the effect that contributory

**Western Ry. of Alabama v. Mays.** 197 Ala. 367, 72 So. 641.

**California.** *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Calif. 148, 162 Pac. 111.

**Georgia.** *Ivey v. Louisville & N. R. Co.*, 18 Ga. App. 434, 89 S. E. 629; *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

**Idaho.** *Neil v. Idaho & W. N. R. R.*, 22 Idaho 74, 125 Pac. 331.

**Indiana.** *Cincinnati, H. & D. R. Co. v. Gross*, — Ind. —, 114 N. E. 962.

**Kansas.** *Duggan v. Missouri Pac. R. Co.*, 96 Kan. 249, 150 Pac. 557.

**Kentucky.** *Louisville & N. R. Co. v. Holloway's Adm'r*, 168 Ky. 262, 181 S. W. 1126; *Louisville & N. R. Co. v. Henig's Adm'r*, 162 Ky. 14, 171 S. W. 853; *Nashville, C. & St. L. Ry.*, 158 Ky. 88, 164 S. W. 310; *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554; *Ellis's Adm'r. v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512.

**Maryland.** *Baltimore & O. R. R. Co. v. Branson*, 128 Md. 678, 98 Atl. 225.

**Michigan.** *Gaines v. Grand Trunk Ry. Co. of Canada*, 193 Mich. 398, 159 N. W. 542; *Collins v. Michigan Cent. R. Co.*, 193 Mich. 303, 159 N. W. 535.

**Minnesota.** *McDonald v. Railway Transfer Co. of Minneapolis*, 121 Minn. 273, 141 N. W. 177

**Missouri.** *Dowell v. Wabash Ry. Co.*, — Mo. App. —, 190 S. W. 939; *Newkirk v. Pryor* (Mo. App.), 183 S. W. 682.

**North Carolina.** *Tilghman v. Seaboard Air Line R. Co.*, 167 N. C. 163, 83 S. E. 315, 1090.

**Oregon.** *Chadwick v. Oregon-Washington R. & Nav. Co.*, 74 Or. 19, 144 Pac. 1165; *Pfeiffer v. Oregon-Washington R. & Nav. Co.*, 74 Or. 307, 144 Pac. 762, 7 N. C. C. A. 685.

**South Dakota.** *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

**Texas.** *Chicago, R. I. & G. Ry. Co. v. De Bord*, — Tex. —, 192 S. W. 767; *Missouri, K. & T. Ry. Co. of Texas v. Bunkley*, — Tex. Civ. App. —, 153 S. W. 937; *Atchison, T. & S. F. Ry. Co. v. Tack*, — Tex. Civ. App. —, 130 S. W. 596.

**Washington.** *Fogarty v. Northern Pac. R. Co.*, 74 Wash. 397, 133 Pac. 609.

**West Virginia.** *Culp v. Virginian Ry. Co.*, — W. Va. —, 92 S. E. 236; *Easter v. Virginian Ry. Co.*, 16 W. Va. 383, 11 N. C. C. A. 101, 86 S. E. 37.

"Contributory negligence is not a bar to a recovery and can only be considered in ascertaining the extent to which damages are to be mitigated." *Southern R. Co. v. Mayes*, 152 C. C. A. 91, 239 Fed. 41.



negligence on the part of the employe shall not be considered for any purpose where the carrier's fault consisted in the violation of a statute—a Federal statute—enacted for the safety of employes (see *Seaboard Air Line v. Horton*, 233 U. S. 492, 503); but this is not such a case, and so the principal provision is the one to be applied. It means, and can only mean, as this court has held, that, where the causal negligence is attributable partly to the carrier and partly to the injured employe, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both.”<sup>6</sup>

§ 578. **Two Theories of Comparative Negligence Extant in United States.** At the time of the enactment of the Federal Employers' Liability Act there were two theories concerning comparative negligence extant in the United States. Under one the plaintiff could recover if his negligence was slight and that of the defendant was gross in comparison, but if the plaintiff was guilty of negligence contributing to his own injury he could not recover unless the defendant's negligence was gross in comparison with that of the plaintiff. Under the other theory of comparative negligence, the negligence of both the plaintiff and the defendant were to be compared, not for the purpose of relieving one of liability or denying the other a right to recover, but for the purpose of reducing the amount of plaintiff's damages according to the extent which his own negligence contributed to the injury.<sup>7</sup> Under the construction which the national Supreme Court has placed upon the federal act, the second theory was adopted as to all interstate employes.<sup>8</sup> The difference between the two theories of contributory negligence was thus pointed out

6. *Seaboard Air Line Ry. Co. v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653.

7. *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461.

8. **United States.** *Seaboard Air Line Ry. v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096.

by the national Supreme Court: "While there are several differences between the state act and the act of Congress, the only difference having a present bearing is one relating to contributory negligence. The state act declares that in cases where the employe's negligence is slight and that of the employer is gross in comparison, the former's negligence shall not bar a recovery, but shall operate to diminish the damages proportionally. In other cases contributory negligence remains a bar as at common law. Comp. Stat., 1907, sec. 2803b; Cobbeys Ann. Stat. 1911, sec. 10592. The act of Congress, on the other hand, declares that the employe's negligence shall not bar a recovery in any case, but shall operate to diminish the damages proportionally in all cases, save those of a designated class, of which this is not one. Thus, it will be seen that the state act is more favorable to the employer than is the act of Congress. The instructions to the jury followed the state act and consequently were more favorable to the company than they would have been had they followed the act of Congress. To illustrate, under the instructions given a finding that the interstate's injuries were caused by concurring negligence of the company and himself and that his negligence was more than slight and the company's less than gross must have resulted in a verdict for the company, while under instructions following the act of Congress such a finding must have resulted in a verdict for the plaintiffs with the damages proportionally diminished."

**§ 579. Purpose of Congress in Modifying Common Law Rule of Contributory Negligence.** The purpose of

33 Sup. Ct. 654, Ann. Cas. 1914C 172; Shanley v. Philadelphia & R. R. Co., 221 Fed. 1012.

**Alabama.** Southern Ry. Co. v. Fisher, — Ala. —, 74 So. 580.

**Kentucky.** Louisville & N. R. Co. v. Holloway's Adm'r, 163 Ky. 125, 173 S. W. 343.

**Michigan.** Walsh v. Lake Shore & M. S. R. Co., 185 Mich. 177. 151 N. W. 754.

**New Jersey.** West Jersey Trust Co. v. Philadelphia R. Co., 88 N. J. L. 102, 95 Atl. 753.

9. Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185.

Congress in modifying the common law rule of contributory negligence by the enactment of Section 3 of the act was thus stated in the report of the judiciary committee of the House of Representatives: "Section 3 is a modification of the common-law rule of contributory negligence. It does not abolish the law. Under its provisions contributory negligence still bars a recovery for personal injury so far as the injury is due to the contributory negligence of the employe, but entitles the employe to recover for the injury so far as it is due to the negligence of the employer. It differs from the Act passed by Congress in June, 1906, on this point, in this: That law provided that contributory negligence did not bar a recovery if the negligence of the employe was slight and that of the employer was gross in comparison. That law modified the common-law rule of contributory negligence and also contained a modification of the common-law doctrine of comparative negligence. We are unable to see any justification whatever in the common-law doctrine of comparative negligence anywhere. It is the only rule of negligence that permits an employe to recover damages for injury to which his own negligence contributed. Comparative negligence is absolutely wrong in principle, for the reason that it permits the employe to recover full damages for injury, even though his own negligence contributed to it. It is true, as the law states it, he can only recover damages when his contributory negligence is slight and that of the employer is gross in comparison. But that rule does not undertake to diminish the verdict in proportion to the negligence of the employe. This may be said in behalf of the doctrine of contributory negligence in its common-law purity, and it is the only reason, so far as we know, that has ever been assigned for its existence: It tends to make the employe exercise a higher degree of care for his safety. If that is a good reason for the existence of that rule, then we believe that Section 3 of this bill is a very great improvement on that doctrine, for the reason that it imposes the burden of the employer's negligence on the employer, and he will thus be induced to exercise higher

care in the selection of his employes, and in other ways, for the safety of persons in his employment. If the law imposes on the employe the burden of his own negligence, that is certainly sufficient, and that is what this section seeks to do, and it also seeks to impose upon the employer the burden of his negligence. It provides that contributory negligence shall not bar a recovery for injury due to the negligence of the employer. It provides that the jury shall diminish the damages suffered by the injured employe in proportion to the amount of negligence attributable to such employe. It is urged by some that such a provision is impracticable of administration and that juries will not divide the damages in accordance with the negligence committed by each. The same objection can be urged against the provision of the bill passed by Congress in 1906, which provided that only slight negligence should not bar a recovery, but that the jury should diminish damages in proportion to such slight negligence. Under that provision the jury would have the same difficulty, if any, in apportioning the damages according to the negligence of each party. We submit, further, that this section of the bill is free from the very unjust principle contained in the common-law doctrine of comparative negligence which allowed the employe to recover full damages for injury to which his own negligence contributed in some degree. It is not a just criticism of a law, conceding the righteousness of its principles, to say that it is impracticable of administration. We submit that the principle in this section is ideal justice, against which no fair argument can be made. It is better that legislatures pass just and fair laws, even though they may be difficult of administration by the courts, rather than to pass unjust and unfair laws because they may be more easily administered by the courts. Courts ought not to be compelled to administer the common-law doctrine of contributory negligence, which puts upon the employe the whole burden of negligence, even though his negligence was slight and that of the employer was gross. That law might to some extent induce higher care on



the part of the employe, but in the same degree, and for the same reason, it induces the employer to have less regard and less care for the safety of his employes. It is urged that juries under this law will wholly ignore the negligence committed by the employe and charge all the injury to the negligence of the employer. We do not believe that this will be the result of the administration of this section. We believe it will appeal to juries as eminently just and they will undertake to enforce it literally to the best of their skill. If juries under the common-law rule of contributory negligence have been disposed to assess damages in spite of the fact that the defendant contributed to the injury by his own negligence, it may be said that the jury recognizes the injustice of the law and undertakes to correct it by what they consider a just and righteous verdict. There is nothing in this law that will induce such a sentiment in the minds of the jury, but it will appeal to them as the true principle, and, in our judgment, they will seek to apply it fairly in the courts. Beach, in his work on contributory negligence, page 136, comments on the law as provided in this section as follows: "Much may be said in favor of the rule which counts the plaintiff's negligence in mitigation of the damages in those cases which frequently arise, wherein, on one hand, a real injury has been suffered by the plaintiff by reason of the culpable negligence of the defendant, and yet, where, on the other hand, the plaintiff's conduct was such as to some extent contribute to the injury, but in so small a degree that to impose upon him the entire loss seems not to take a just account of the defendant's negligence. In those cases, which may be denominated 'hard cases,' the Georgia and Tennessee rule in mitigation of damages without necessarily sacrificing the principle upon which the law as to contributory negligence rests is a rule against which, in respect of justice and humanity, nothing can be said. Where the severity of the general rule might refuse the plaintiff any remedy whatever, as the sheer injustice of the rule, as laid down in *Davis v. Mann*, would impose the whole liability upon the defendant, it

is quite possible to conceive a case where the application of the rule which mitigates the damages in proportion to the plaintiff's misconduct, but does not decline to impose them at all, would work substantial justice between the parties.' Shearman and Redfield on the Law of Negligence fifth edition, page 158, in speaking of this rule, say: 'This is substantially an adoption of the admiralty rule, which is certainly nearer ideal justice, if juries could be trusted to act upon it.' The United States has adhered much closer to the common-law doctrine of contributory negligence than the leading countries of Europe. The laws of England, Germany, and Italy go much further to discharge the employe from the responsibility of his own act than does the common-law doctrine of comparative negligence. The laws of France, Switzerland, and Russia are in practical accord with the provisions of section 3 of this bill. The rule provided for in this section is recognized to some extent in this country. Maryland and some of the other States have passed statutes seeking to divide the responsibility where both parties are guilty of negligence. The provisions of this section are certainly just. What can be more fair than that each party shall suffer the consequences of his own carelessness? It certainly appeals more strongly to the fair mind than the proposition that the employe shall have no redress whatever, even though his injury is due mainly to the negligence of another. As a consequence of this legislation, we believe there will be fewer accidents. By the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety."

**§ 580. Apportionment of Damages under Federal Act Different from Georgia Statute.** Even prior to the passage of the Federal Employers' Liability Act, a few states had, by statutory enactment, adopted the doctrine of comparative negligence as distinguished from contributory negligence. The Georgia statute respecting the apportionment of damages has been construed to mean

that where the injury is the result of mutual negligence there can be no recovery unless the person inflicting the injury is more in fault than the one who is injured. But such rule is not to be applied in the apportionment of damages under the federal act for if the carrier's negligence caused the injury in part, the contributory negligence of the employe does not defeat the action no matter if the carrier is less in fault than the employe.<sup>10</sup>

**§ 581. Employe's Contributory Negligence to Reduce Damages must Proximately Contribute to Injury.**

The damages recoverable by an employe for injuries due to the negligence of a common carrier cannot be reduced by reason of any slight negligence on the part of the employe. Before the damages can be reduced the contributory negligence of the employe must directly and proximately contribute to the injury. In other words, the negligence of the employe, in order to reduce the damages, must be causal<sup>11</sup> and not the occasion, that is, that which incidentally brings to pass an event without being the efficient cause of an injury.<sup>12</sup>

**§ 582. Gross Negligence of Plaintiff and Slight Negligence of Defendant Cannot Defeat Recovery.**

Under the federal act if the carrier is negligent in any degree and such negligence contributes as a proximate cause to the injury, plaintiff's right to recover cannot be defeated although his negligence might have been gross and the negligence of the defendant comparable therewith slight.<sup>13</sup> And a demurrer to the evidence or a non-

10. *Southern R. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

11. *United States*, Illinois Cent. R. Co. v. Skaggs, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249; *Illinois Cent. R. Co. v. Porter*, 207 Fed. 311.

*Alabama*. *Southern R. Co. v. Peters*, 194 Ala. 94, 69 So. 611.

*Georgia*. *Macon, D. & S. R. Co. v. Robinson*, 19 Ga. App. 370, 91 S. E. 492.

*Kansas*. *Pyles v. Atchison, T.*

*& S. F. R. Co.*, 97 Kan. 455, 155 Pac. 788.

*Kentucky*. *Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co.*, 172 Ky. 55, 188 S. W. 1061. *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S W 786.

12. *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

13. *United States*. *Southern R. Co. v. Mays*, 152 C. C. A. 91, 239

suit cannot in any case under the federal act be given or sustained on the ground of plaintiff's contributory negligence.<sup>14</sup> Judge Knappen, speaking for the Federal Circuit Court of Appeals in *Pennsylvania Co. v. Cole*, cited *supra*, said: "But the Employers' Liability Act expressly abrogates the common law rule under which action was barred by the negligence of the plaintiff proximately contributing to the accident and substitutes therefor the rule of comparative negligence. Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery."

Fed. 41; *Pennsylvania Co. v. Sheeley*, 137 C. C. A. 471, 221 Fed. 901; *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952; *Pennsylvania Co. v. Cole*, 131 C. C. A. 244, 214 Fed. 948; *Louisville & N. R. Co. v. Lankford*, 126 C. C. A. 247, 209 Fed. 321; *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887; *Chicago Great Western R. Co. v. McCormick*, 118 C. C. A. 527, 200 Fed. 375, 47 L. R. A. (N. S.) 18.

**Alabama.** *Western Ry. of Ala. v. Mays*, 197 Ala. 367, 72 So. 641; *Louisville & N. R. Co. v. Fleming*, 194 Ala. 51, 69 So. 125.

**Georgia.** *Louisville & N. R. Co. v. Paschal*, 145 Ga. 521, 89 S. E. 620.

**Kentucky.** *Lexington & E. R. Co. v. Smith's Adm'r*, 172 Ky. 117, 188 S. W. 1091.

**Maryland.** *Baltimore & O. R. Co. v. Whitacre*, 124 Md. 411, 92 Atl. 1060.

**Minnesota.** *Knapp v. Great Northern R. Co.*, 130 Minn. 405, 153 N. W. 848.

**Missouri.** *Brightwell v. Lusk*, 194 Mo. App. 643, 189 S. W. 413;

*Koukouris v. Union Pac. R. Co.*, 193 Mo. App. 495, 186 S. W. 545; *Newkirk v. Pryor* (Mo. App.), 183 S. W. 682; *Noel v. Quincy, O. & K. C. R. Co.*, — Mo. App. —, 182 S. W. 787.

**North Dakota.** *Manson v. Great Northern R. Co.*, 31 N. D. 643, 155 N. W. 32.

**South Dakota.** *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

**Vermont.** *Lynch's Adm'r v. Central Vermont R. Co.*, 89 Vt. 363, 95 Atl. 683.

**Virginia.** *Chesapeake & O. R. Co. v. Meadows*, 119 Va. 33, 89 S. E. 244.

**Washington.** *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100.

**West Virginia.** *Culp v. Virginian Ry. Co.*, — W. Va. —, 92 S. E. 236.

14. *Louisville & N. R. Co. v. Wene*, 121 C. C. A. 245, 202 Fed. 887; *Sandidge v. Atchison, T. & S. F. R. Co.*, 113 C. C. A. 653, 193 Fed. 867; *Horton v. Seaboard Air Line R. Co.*, 157 N. C. 146, 72 S. E. 958.



§ 583. **When Defendant's Act is no Part of Causation, Plaintiff Cannot Recover.** On the other hand if the plaintiff's act is the sole cause of his injury without any act on the part of the defendant contributing as a part of the causation, there can be no recovery under the federal act.<sup>15</sup> Whether under the facts of a particular case the plaintiff's negligence was the sole cause of his injury or whether the negligence of the defendant contributed as a part of the causation, has already been raised in cases under the federal act and it is frequently a difficult question to solve. Such questions will no doubt arise in the future in other cases for the reason that if the plaintiff's negligence was the sole cause of his injury there can be no recovery, but if the defendant's negligence contributes as a proximate cause, the plaintiff can recover no matter how gross his negligence may be. In two cases, *Pankey v. Railroad* and *Ellis v. Railroad*, cited *supra*, the courts denied a recovery under the federal act for the reason that under the facts the plaintiff's act was the sole cause of his injury. On the other hand courts have denied the application of the same principle under the facts and held the defendant's act was a part of the causation.<sup>16</sup>

§ 584. **How Damages Apportioned When Employee is Guilty of Contributory Negligence.** Where the negligence which caused the injury or death of an employee

15. **United States.** *Great Northern R. Co. v. Wiles*, 240 U. S. 444, 60 L. Ed. 732, 36 Sup. Ct. 406; *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168.

**Georgia.** *Louisville & N. R. Co. v. Kemp*, 140 Ga. 657, 79 S. E. 558.

**Kentucky.** *Norfolk & W. R. Co. v. Short's Adm'r*, 171 Ky. 647, 188 S. W. 786; *Ellis' Adm'r v. Louisville, H. & St. L. R. Co.*, 155 Ky. 745, 160 S. W. 512.

**Missouri.** *Pankey v. Atchison, T. & S. F. R. Co.*, 180 Mo. App. 185, 6 N. C. C. A. 74, 168 S. W. 274.

**Oregon.** *Pfeiffer v. Oregon-Washington R. & Nav. Co.*, 74 Ore. 307, 7 N. C. C. A. 685, 144 Pac. 762.

**Virginia.** *Chesapeake W. Ry. Co. v. Shiflett's Adm'r*, 118 Va. 63, 86 S. E. 860.

16. *Spokane & I. E. R. Co. v. Campbell*, 133 C. C. A. 370, 217 Fed. 518; *New York, C. & St. L. R. Co. v. Niebel*, 131 C. C. A. 248, 214 Fed. 952; *Pennsylvania Co.*

is partly attributable to the employe himself and partly attributable to the carrier, the plaintiff cannot recover full damages but only such a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.<sup>17</sup> Justice Van Davenport,

v. Cole, 131 C. C. A. 244, 214 Fed. 948; Ross v. St. Louis & S. F. R. Co., 93 Kan. 517, 7 N. C. C. A. 737, 144 Pac. 844; Louisville & N. R. Co. v. Heinig's Adm'r, 162 Ky. 14, 171 S. W. 853.

17. **United States.** Illinois Cent. R. Co. v. Skaggs, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249; Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 60 L. Ed. 431, 36 Sup. Ct. 185; Seaboard Air Line Ry. Co. v. Tilghman, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, 3 N. C. C. A. 806, Ann. Cas. 1914C 172; Shanley v. Philadelphia & R. R. Co., 221 Fed. 1012.

**Alabama.** Southern Ry. Co. v. Fisher, — Ala. — 74 So. 580 Southern R. Co. v. Peters, 194 Ala. 94, 69 So. 611.

**Arkansas.** St. Louis, I. M. & S. Ry. Co. v. Rodgers, 118 Ark. 263, 176 S. W. 696; St. Louis Southwestern R. Co. v. Anderson, 117 Ark. 41, 173 S. W. 834.

**Arizona.** Arizona Eastern R. Co. v. Bryan, 18 Ariz. 106, 157 Pac. 376.

**Georgia.** Ivey v. Louisville & N. R. Co., 18 Ga. App. 434, 89 S. E. 629.

**Indiana.** Cincinnati, H. & D. R. Co. v. Gross, — Ind. —, 114 N. E. 962.

**Kentucky.** Louisville & N. R. Co. v. Thomas' Adm'r, 170 Ky. 145, 185 S. W. 840; Louisville &

N. R. Co. v. Holloway's Adm'r 168 Ky. 262, 181 S. W. 1126; Louisville & N. R. Co. v. Holloway's Adm'r, 163 Ky. 125, 173 S. W. 343; Cincinnati, N. O. & T. P. Ry. Co. v. Goode, 163 Ky. 60, 173 S. W. 329; Louisville & N. R. Co. v. Heinig's Adm'r, 162 Ky. 14, 171 S. W. 853; Nashville, C. & St. L. R. Co. v. Henry, 158 Ky. 88, 164 S. W. 310; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609, 161 S. W. 554.

**Maryland.** Baltimore & O. R. Co. v. Branson, 128 Md. 678, 98 Atl. 225,

**Michigan.** Collins v. Michigan Cent. R. Co., 193 Mich. 303, 159 N. W. 535; Walsh v. Lake Shore & M. S. R. Co., 185 Mich. 177, 151 N. W. 754.

**Missouri.** Dowell v. Wabash Ry. Co., — Mo. App. —, 190 S. W. 939; Blankenbaker v. St. Louis & S. F. R. Co., — Mo. —, 187 S. W. 840; Newkirk v. Pryor (Mo. App.), 183 S. W. 682; Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202, 177 S. W. 1127; Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106, 8 N. C. C. A. 538. Ann. Cas. 1916B 147, 172 S. W. 340.

**New Jersey.** West Jersey Trust Co. v. Philadelphia & R. R. Co., 88 N. J. L. 102, 95 Atl. 753.

**New York.** McAuliffe v. New York Cent. & H. River R. Co., 172 N. Y. App. Div. 597, 158 N. Y. Supp. 922.

speaking for the Supreme Court in the Earnest case cited, said: "The statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employe."

**§ 585. When Duty of Trial Court to Instruct on Contributory Negligence Arises under Federal Act.** If there is evidence sufficient for the issue of contributory negligence to be submitted to the jury it is error for a trial court to refuse an instruction on its effect in reducing the damages unless liability is based upon a federal statute enacted for the safety of employes.<sup>18</sup> Thus, in the case cited, it was held that the trial court erred in refusing to give the following instruction to the jury: "If you shall find that the plaintiff was guilty of negligence which contributed to cause his injury, and that the defendant was also guilty of negligence which contributed, with the negligence of the plaintiff, to cause injury to him, then it is your duty to diminish the amount which, in your opinion, under the evidence, you believe that the plaintiff herein will be entitled to recover by reason of the negligence of the defendant, by an amount in proportion to the amount of negligence attributable to the plaintiff." But if there is no evidence of contributory negligence sufficient to be submitted to

**Texas.** Gulf, C. & S. F. Ry. Co. v. Cooper, — Tex. Civ. App. —, 191 S. W. 579.

18. Snyder v. Great Northern R. Co., 88 Wash. 949, 152 Pac. 703.

the jury, no instruction should be given upon the subject.<sup>19</sup>

§ 586. **Method of Instructing the Jury When there is Evidence of Contributory Negligence.** In actions under the federal act predicated a recovery upon some act of negligence other than the violation of federal statutes for the safety of employes where there is evidence tending to show contributory negligence on the part of the plaintiff, the method of instructing the jury was thus well and clearly stated: "In cases of this character, where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be carefully instructed concerning the rule of comparative negligence established by the federal statute. It is the duty of the jury first to determine whether or not the defendant was guilty of causal negligence; for, if that issue is determined against the plaintiff, there can be no recovery. If the issue of the defendant's negligence is determined in favor of the plaintiff then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident, and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them, the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributed to each. After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the

19. *Chesapeake & O. R. Co. v. v. Stalcup*, — Tex. Civ. App. Cooper, 168 Ky. 137, 181 S. W. —, 167 S. W. 279. 933; *Fort Worth & D. C. R. Co.*



measure of negligence charged against the defendant, to be awarded as damages to the plaintiff."<sup>20</sup>

§ 587. **Instruction of Contributory Negligence in Language of Statute not Erroneous.** An instruction on contributory negligence in the language of the statute is not error in the absence of a request for a charge more fully defining the meaning of the statute. Thus, a trial court charged the jury in an action under the federal act that in the event they found the plaintiff guilty of contributory negligence they should reduce his damages in proportion to the amount of negligence which is attributable to him. No other instruction defining the word "proportion" was given. "The instruction given," said the court,<sup>21</sup> "is almost in the identical language of the statute and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed." But an instruction in the language of the statute, that is, that the damages should be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff with the additional qualifying clause, "as compared with the negligence, if any, attributable to the defendant," was erroneous for the reason that the clause "as compared with the negligence, if any, attributable to the defendant" does not state the correct rule.<sup>22</sup>

§ 588. **Erroneous Instructions on Contributory Negligence Under the Federal Act.** In an action under

20. *Waina v. Pennsylvania Co.*, 251 Pa. 213, 96 Atl. 461.

21. *St. Louis & S. F. R. Co. v. Brown*, 241 U. S. 233 60 L. Ed. 966, 36 Sup. Ct. 602; *Contra*, *Nashville, C. & St. L. R. Co. v. Banks*, 156 Ky. 609, 161 S. W. 554.

An instruction that the damages should be diminished by the

jury in proportion to the amount of negligence attributable to such employe follows the language of the statute and is not, therefore, erroneous. *Kippenbrock v. Wabash R. Co.*, 270 Mo. 479, 194 S. W. 50.

22. *Cross v. Chicago, B & Q. R. Co.*, 191 Mo. App. 202, 177 S. W. 1127.

the federal act, a trial court instructed the jury as to the effect of contributory negligence, as follows: "Contributory negligence is the negligent act of a plaintiff which, concurring and co-operating with the negligent act of a defendant, is the proximate cause of the injury. If you should find that the plaintiff was guilty of contributory negligence the act of Congress under which this suit was brought provides that such contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence, as compared with the negligence of the defendant. If the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence." The phrase in the quoted instruction, "as compared with the negligence of the defendant" was condemned by the Supreme Court of the United States as being improper under the federal act.<sup>23</sup> Concerning this instruction, Mr. Justice Van Devanter, speaking for the court, said: "The other criticism deserves more discussion. The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as compared with the combined

23. *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172. See also *West Jersey Trust Co. v. Philadelphia & R. R. Co.*, 88 N. J. L. 102, 95 Atl. 753.

negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employe.'<sup>24</sup> An instruction that if the employe was guilty of negligence which contributed to his injuries, the jury must diminish the damages in proportion to the amount of negligence attributable to him, was held erroneous for the same reason.<sup>25</sup> In another action under the federal act the court instructed the jury that, if the deceased was guilty of contributory negligence, and "that said negligence directly contributed to his injury, you should take said negligence into consideration in arriving at the amount of your verdict as hereinafter explained, if you find from the evidence that the plaintiff is entitled to recover, but if you find from the evidence that the contributory negligence of the deceased, Otto N. Ross, was the sole and proximate cause of his death, then you should find a verdict for defendant." A verdict was returned for the defendant and the trial court set it aside because the instruction was erroneous in the latter part as to contributory negligence. The appellate court held that the plaintiff had a right to a plain and unambiguous instruction to the effect that contributory negligence was not a complete defense un-

24. To the same effect: *Illinois Cent. R. Co. v. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 Sup. Ct. 249.

25. *Nashville, C. & St. L. R.*

*Co. v. Banks*, 159 Ky. 609, 161 S. W. 554. *Contra*: *Kippenbroch v. Wabash R. Co.*, 270 Mo. 479, 194 S. W. 50.

der the federal statute referred to, but should be considered in mitigation of damages; and that, as the language used was doubtful in meaning and confusing, and the trial judge believed that the instruction did not sufficiently inform the jury, the order granting a new trial was not reversed.<sup>26</sup> A trial court in an action under the federal act instructed the jury that they should determine the full amount of damages sustained by the plaintiff and "deduct from that whatever amount you think would be proper for the contributory negligence." This charge was erroneous for the reason that the court thereby committed to the jury the method of diminishing the damages without naming any standard to which their action should conform other than their own conception of what was reasonable.<sup>27</sup>

**§ 589. When Contributory Negligence of Employee Does not Diminish Damages—Federal Safety Appliance Laws.** Even though an employee injured or killed while engaged in interstate commerce was guilty of contributory negligence, his damages cannot be reduced when the violation of a federal statute enacted for the safety of employees, such, for instance, as the Federal Safety Appliance Act, Boiler Inspection Act and Hours of Service Act, contributed as a cause to the injury or death.<sup>28</sup> "According to the evidence adduced

26. *Ross v. St. Louis & S. F. R. Co.*, 93 Kan. 517, 144 Pac. 844.

27. *Seaboard Air Line Ry. Co. v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. Ct. 653.

An instruction on the question of contributory negligence and its effect on the measure of damages, which failed to prescribe the rule for determining the amount of the deduction required to be made, was erroneous. *Davis v. Southern Ry. Co.*, — N. C. —, 96 S. E. 41.

28. *United States. Baltimore & O. R. Co. v. Wilson*, 242 U. S. 295, 61 L. Ed. 312, 37 Sup. Ct.

123; *Spokane & I. E. R. Co. v. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 Sup. Ct. 683; 12 N. C. C. A. 1083; *Atchison, T. & S. F. R. Co. v. Swearingen*, 239 U. S. 339, 60 L. Ed. 317, 36 Sup. Ct. 121; *Seaboard Air Line Ry. Co. v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, 35 Sup. S. 653; *Southern R. Co. v. Crockett*, 234 U. S. 725, 58 L. Ed. 1564, 34 Sup. Ct. 897, *Grand Trunk Western R. Co. v. Lindsay*, 233 U. S. 42, 58 L. Ed. 838, 34 Sup. Ct. 581, Ann. Cas. 1914C 168; *Norfolk & W. R. Co. v. Earnest*, 229 U. S. 114, 57 L.



by the plaintiff, he was injured on account of a defect in the automatic coupler in violation of the Safety Appliance Act. The Supreme Court of the United States has held that the question of comparative negligence does not arise where the negligence of the carrier consists in the violation of a federal statute, for in such cases the defense of contributory negligence is entirely abrogated by the provision of the act above quoted".<sup>29</sup> The clause "statute enacted for the safety of employes" in section 3 of the Federal Employers' Liability Act refers only to federal statutes and not to state laws.<sup>30</sup>

**§ 590. Burden is Upon Defendant to Prove Contributory Negligence.** In all actions under the Federal Employers' Liability Act, the burden of proving that the plaintiff, or the decedent in cases where the ad-

Ed. 1096, 33 Sup. Ct. 654, Ann. Cas. 1914C 172; *St. Louis Merchants' Bridge Terminal Ry. Co. v. Schuerman*, 150 C. C. A. 203, 237 Fed. 1; *Clark v. Erie R. Co.*, 230 Fed. 478; *Johnson v. Great Northern R. Co.*, 102 C. C. A. 89, 178 Fed. 643.

**Alabama.** *Louisville & N. R. Co. v. Blankenship*, — Ala. —, 74 So. 960; *Western Ry. of Alabama v. Mays*, 197 Ala. 367, 72 So. 641.

**Arkansas.** *St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

**Missouri.** *Christy v. Wabash R. Co.*, 195 Mo. App. 232, 191 S. W. 241; *Carpenter v. Kansas City Southern R. Co.*, 189 Mo. App. 164, 175 S. W. 234; *Young v. Lusk*, 268 Mo. 625, 187 S. W. 849; *Moore v. St. Joseph & G. I. R. Co.*, 268 Mo. 31, 186 S. W. 1035.

**New Jersey.** *Parker v. Atlantic City R. Co.*, 87 N. J. L. 148, 93 Atl. 574.

**South Carolina.** *Steele v. Atlantic Coast Line R. Co.*, 103 S.

C. 102, 87 S. E. 639.

**South Dakota.** *Fletcher v. South Dakota Cent. R. Co.*, 36 S. D. 401, 155 N. W. 3.

"It is undisputable that plaintiff was entitled to recover if the tender was not equipped with grab-irons and an operative automatic coupler in the manner required by the Safety Appliance Act, and if the absence of these or either of them contributed to his injury, and this without regard to any question of contributory negligence." *Blair, J.*, in *Moore v. St. Joseph & G. I. R. Co.*, 268 Mo. 31, 186 S. W. 1035, affirmed in 243 U. S. 311, 61 L. Ed. 741, 37 Sup. Ct. 278.

29. *St. Louis Southwestern R. Co. v. Anderson*, 117 Ark. 41, 173 S. W. 834.

30. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, 8 N. C. C. A. 834, L. R. A. 1915C 1; Ann. Cas. 1915B. 475; *Smithson v. Atchison, T. & S. F. R. Co.*, 174 Cal. 148, 162 Pac. 111.

ministrator is suing, was guilty of contributory negligence, is upon the defendant.<sup>31</sup>

§ 591. **Whether Contributory Negligence Must be Pledged, Determined by State Law.** The question whether contributory negligence of the injured employe, in order to be available to the defendant must be pleaded, is to be determined by the laws of the state where the action is pending, for such a matter relates to procedure and the laws of the state govern as to procedure even in actions under the Federal Employers' Liability Act.<sup>32</sup> The general rule is that unless the plaintiff's contributory negligence appears as a matter of law by his proof the plea of contributory negligence must be specially pleaded, though a few courts hold to the contrary; but as contributory negligence under the federal act only mitigates the damages, some doubt exists as to whether it must be specially pleaded; for the general rule is, unless otherwise provided by statute, matters in diminution of damages need not be specially pleaded. Such was the rule at common law.<sup>33</sup> The federal courts have constantly held that in ordinary actions by an employe against an employer, the burden of proving that the plaintiff's negligence contributed to the injury, is upon the defendant.<sup>34</sup> This rule is also applicable to actions under the Employers' Liability

31. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265; *Ann. Cas.* 1916B 252; *Lusk v. Osborne*, 127 Ark. 170, 191 S. W. 944.

32. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, *Ann. Cas.* 1916B 252; *Delano v. Roberts* (Mo. App.), 182 S. W. 771; *Chesapeake & O. R. Co., v. Cooper*, 168 Ky. 137, 181 S. W. 933; *Carpenter v. Kansas City Southern R. Co.*, 189 Mo. App. 164, 175 S. W. 234.

"Contributory negligence, even under the Federal Employers' Liability Act, is a matter of defense." *Carpenter v. Kansas City Southern R. Co.*, *supra*.

33. *Greenleaf on Evidence* (14th ed.) 393; *Blizzard v. Applegate*, 61 Ind. 368; *Smith v. Lisher*, 23 Ind. 500; *Osborn v. Lovell*, 36 Mich. 250; *Delevan v. Bates*, 1 Mich. 97; *Beck v. Dowell*, 40 Mo. App. 71; *Atteberry v. Powell*, 29 Mo. 429.

34. *Washington & G. R. Co. v. Harmon's Adm'r*, 147 U. S. 571, 37 L. Ed. 284, 13 Sup. Ct. 557; *Hough*

Act.<sup>35</sup> Since, therefore, the federal Supreme Court has held that the burden of proving contributory negligence of the plaintiff in actions under the national statute is upon the defendant, it would seem to follow that it is obligatory upon the defendant to plead such a defense.<sup>36</sup> A statute of North Carolina provided that in all actions to recover damages by reason of defendant's negligence, where contributory negligence is relied on as a defense, it shall be set up in the answer and proved at the trial. Another section of the statutory law of the same state provided generally that matters in diminution of damages need not be specially pleaded. In an action by an employe against a common carrier for injuries under the Federal Employers' Liability Act, it was held by the supreme court of that state that the defendant could not avail itself of the partial defense of contributory negligence unless the same was pleaded in its answer. The court properly held that the specific statute mentioned controlled in preference to the general statute as to matters in mitigation.<sup>37</sup> If the contributory negligence of the plaintiff is not pleaded in the defendant's answer, an instruction presenting this defense should not be submitted.<sup>38</sup>

**§ 592. Evidence of Contributory Negligence Admissible Under General Denial, When.** A carrier is entitled to a fair opportunity to show in diminution of damages any negligence attributable to the employe. If, therefore, the laws of the forum provide that contributory negligence may be shown under a general

v. Texas & P. R. Co., 100 U. S. 213, 25 L. Ed. 612; Hemingway v. Illinois Cent. R. Co., 52 C. C. A. 477, 114 Fed. 843.

35. Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. Ed. 1433, 35 Sup. Ct. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B 252; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. Ed. 907, 33 Sup. Ct. 580.

36. Delano v. Roberts, — Mo. App. —, 182 S. W. 771; Carpenter v. Kansas City Southern R. Co., 189 Mo. App. 164, 175 S. W. 234.

37. Fleming v. Norfolk Southern R. Co., 160 N. C. 196, 76 S. E. 212.

38. Chesapeake & O. Ry. Co. v. Cooper, 168 Ky. 137, 181 S. W. 933.

denial,<sup>39</sup> a trial court, in excluding evidence to that end, deprives the carrier of a federal right and the fact that counsel, in attempting to introduce the evidence, did not state that it was offered in mitigation only, does not alter the rule.<sup>40</sup> "The state Supreme Court upheld the railroad company's claim of right," said Mr. Justice McReynolds in the last case cited, "to show contributory negligence under its general denial; but the trial court emphatically denied this and positively excluded all evidence to that end. As, under the Federal statute, contributory negligence is no bar to recovery, the plain purpose in offering the excluded evidence was to mitigate damages. In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated; but counsel had no reason to anticipate such a ruling and certainly, we think, were not required to do so at their peril. Plaintiff in error has been improperly deprived of a Federal right."

39. *Jones v. Kansas City Southern R. Co.*, 137 La. 178, 11 N. C. C. A. 43, 68 So. 401.

40. *Kansas City Southern R. Co. v. Jones*, 241 U. S. 181, 60 L. Ed. 943, 36 Sup. Ct. 513.



## CHAPTER XXX.

### BENEFICIARIES UNDER THE LIABILITY ACT.

- Sec. 593. Beneficiaries under the Federal Statute.  
Sec. 594. Parents not Entitled to Damages when there is a Widow or Children.  
Sec. 595. Alien Dependents Residing Abroad may Recover under Federal Act.  
Sec. 596. Existence of Beneficiaries Named in Statute Jurisdictional.  
Sec. 597. Who are "Next of Kin" under Federal Act must be Determined by State Law.  
Sec. 598. Illegitimate Children may be Next of Kin within Meaning of Federal Statute.

#### § 593. Beneficiaries under the Federal Statute.

In case of the death of an employe under the conditions described in the act, the personal representative may bring an action, first, for the benefit of the widow, or husband or children of the employe.<sup>1</sup> If there be no husband, widow or children, then the employe's parents become the beneficiaries under the federal act.<sup>2</sup> If there be no husband, widow or children and no parents of the employe surviving him, then the action may be brought for the benefit of the next of kin dependent upon such employe.<sup>3</sup> "The Federal Employers' Liability Act

1. Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co., 172 Ky. 55, 188 S. W. 1061.

2. Illinois Cent. R. Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 30; Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39; Berg v. Atlantic Coast Line R. Co., — S. C. —, 93 S. E. 390; Tobin v. Bruce, — S. D. —, 162 N. W. 933; Geer v. St. Louis, S. F. & T. Ry. Co., — Tex. —, 194 S. W. 939.

3. United States. Seaboard Air Line Ry. v. Kenney, 240 U. S. 489, 60 L. Ed. 762, 36 Sup. Ct. 458; McGovern v. Philadelphia & R. R.

Co., 235 U. S. 389, 59 L. Ed. 283, 35 Sup. Ct. 127, 8 N. C. C. A. 67, Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

Arkansas. Long v. Biddle, 124. Ark. 127, 186 S. W. 601.

Kentucky. Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144, 181 S. W. 940.

Mississippi New Orleans, M. & C. R. Co. v. Jones, 111 Miss. 852, 72 So. 681.

Missouri. Smith v. Pryor, 195 Mo. App. 259, 190 S. W. 69.

North Carolina. In re Stone, 173 N. C. 208, 15 N. C. C. A. 665, 91 S. E. 852.

provides that an action shall be brought by the personal representative of the deceased employe 'for the benefit (1) of the surviving widow, or husband and children of such employe; and, if none, then (2) of such employe's parents; and if none, then (3) of the next of kin dependent upon such employe.' The federal statute therefore creates three classes, which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provision 'dependent upon such employe' (Allen, J., *Dooley v. Railroad*, 163 N. C. 454, 79 S. E. 970), then such person is excluded from that class, and if such exclusion shall apply to the whole of that class, then there can be no recovery."<sup>4</sup>

§ 594. **Parents not Entitled to Damages when there is a Widow or Children.** Under the federal act the intestate's mother is not entitled to share in the damages when there is a widow.<sup>5</sup> This conclusion necessarily follows from a reading of the statute, because none of the beneficiaries in the second class, the parents, are entitled to any damages, no matter how dependent they were, if the decedent left surviving him dependent beneficiaries, named in the first class, that is, a widow or children. On the other hand, if there are no beneficiaries specified in the first class, the beneficiaries mentioned in the second class may then recover, if they prove a pecuniary loss by reason of the death of the deceased.

Ohio. *Ransom v. New York, C. & St. L. R. Co.*, 93 Ohio, St. 223, 13 N. C. C. A. 447, L. R. A. 1916E 704, 112 N. E. 586.

Texas. *St. Louis, S. F. & T. Ry. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1178.

4. *In re Stone*, 173 N. C. 208, 15 N. C. C. A. 665, 91 S. E. 852.

5. *Goen v. Baltimore & O. S. W. R. Co.*, 179 Ill. App. 566; *Davis' Adm'r v. Cincinnati, N. O. & T. P. R. Co.*, 172 Ky. 55, 188 S. W. 1061; *Geer v. St. Louis, S. F. & T. Ry. Co.*, — Tex. Civ. App. —, 194 S. W. 939; *St. Louis, S. F. & T. Ry. Co. v. Geer*, — Tex. Civ. App. —, 149 S. W. 1179.

**§ 595. Alien Dependents Residing Abroad may Recover under Federal Act.**

Whether alien dependents of a person killed by the negligence of another can recover has been the subject of conflicting decisions by the courts of this country, some holding that they are included as beneficiaries under suits giving actions for death, and others holding that they are excluded.<sup>6</sup> A federal district court held that the Federal Employers Liability Act did not authorize a recovery for the sole benefit of alien parents of an employe, who resided abroad.<sup>7</sup> But when this case reached the Supreme Court of the United States on writ of error, that court held such parents could recover for the death of an employe in an action under the federal act.<sup>8</sup> In so holding, Mr. Justice Holmes, after referring to cases from other jurisdictions,<sup>9</sup> said: "We may refer to these cases for their reasoning without reproducing it, and need not do much more than add that the policy of the Employers Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of

6. Some of the decisions affirming that alien beneficiaries can recover, are the following: *Szymanski v. Blumenthal*, 3 Pennw. (Del.) 558, 52 Atl. 347; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 193, 63 N. E. 94, aff'g 95 Ill. App. 635; *Mulhall v. Fallon*, 176 Mass. 266 54 L. R. A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 99 Am. St. Rep. 534, 93 N. W. 1057. Others denying the right of recovery are: *Maiorano v. Baltimore & O. R. Co.*, 216 Pa. 402, 21 L. R. A. (N. S.) 271, 65 Atl. 1077; *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *McMillan v. Spider Lake Saw Mill & Lumber Co.*, 115 Wis.

332, 60 L. R. A. 589, 95 Am. St. Rep. 947, 91 N. W. 979.

7. *McGovern v. Philadelphia & R. Ry. Co.*, 209 Fed. 975.

8. *McGovern v. Philadelphia & R. R. Co.*, 235 U. S. 389, 59 L. Ed. 283, 35 Sup. Ct. 127, 8 N. C. C. A. 67. Accord: *Bombolis v. Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385; *Kipros v. Uintah R. Co.*, 45 Utah 389, 146 Pac. 292.

9. The cases referred to were the following: *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 193; 63 N. E. 94, aff'g 95 Ill. App. 635; *Atchison, T. & S. F. R. Co. v. Fajardo*, 74 Kan. 314, 6 N. R. A. (N. S.) 681, 86 Pac. 301; *Melzner v. Northern Pac. R. Co.*, 46 Mont. 277, 127 Pac. 1002; *Mulhall v. Fallon*, 176 Mass. 266, 54 L. R. A. 934, 79 Am. St. Rep. 309, 57 N. E. 386.

railroad companies. Even if that were its only object, we might accept the distinction expressed in *Mulhall v. Fallon*, *supra*, between the duties imposed by a statute upon persons in another state and benefits conferred upon them. Extra-territorial application would naturally not be given to the first, 'but rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered.' *Mulhall v. Fallon*, *supra* (p. 268). The rights and remedies of the statute are the means of executing its policy. If this 'puts burdens on our own citizens for the benefit of non-resident aliens,' as said by the district court, quoting the *Deni* case, *supra*, it is a burden imposed for wrongdoing that has caused the destruction of life. It is to the prevention of this that the statute is directed. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be wife, children or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed."

§ 596. **Existence of Beneficiaries Named in Statute Jurisdictional.** If an employe of a railroad suffers death while the carrier is engaged in interstate commerce, and while he is employed in such commerce, no right of action under any law exists against the carrier for negligence in causing such death, where none of the classes mentioned in the federal statute exists or survive the decedent. The right of action given under the federal law is conferred upon them and no one else. Hence the existence of such beneficiaries is jurisdictional to a right of action.<sup>10</sup> That no action exists for the

10. *United States. Seaboard* S. 489, 60 L. Ed. 762, 36 Sup. Air Line Ry. v. Kenney, 240 U. Ct. 458; *Moffett v. Baltimore &*



death of an employe unless the beneficiaries named in the act survive was affirmed by the Supreme Court of the United States.<sup>11</sup> In the Garrett case, the court said: "The nature of the rights and responsibilities arising out of this act has been discussed and determined in four opinions announced by this court since the instant cause was decided by the Circuit Court of Appeals. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C. 176n; *American R. Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456, 33 Sup. Ct. Rep. 224; *Gulf, C. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, 57 L. Ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C 159. It is now definitely settled that the act declared two distinct and independent liabilities resting upon the common foundation of a wrongful injury: (1) liability to the injured employe for which he alone can recover; and (2), in case of death, liability to his personal representative 'for the benefit of the

O. R. Co., 135 C. C. A. 607, 220 Fed. 39; *Thomas v. Chicago & N. W. R. Ry. Co.*, 202 Fed. 766.

**Arkansas.** *Long v. Biddle*, 124 Ark. 127, 186 S. W. 601.

**Kansas.** *Griffith v. Midland Valley R. Co.*, 100 Kan. 500, 166 Pac. 467.

**Kentucky.** *Cincinnati, N. O. & T. P. R. Co. v. Hansford*, 173 Ky. 126, 190 S. W. 690; *Illinois Cent. R. Co. v. Doherty's Adm'r*, 153 Ky. 363, 47 L. R. A. (N. S.) 31, 155 S. W. 1119.

**Mississippi.** *New Orleans, M. & C. R. Co. v. Jones*, 111 Miss. 852, 72 So. 681.

**Montana.** *Melzner v. Northern Pac. R. Co.*, 46 Mont. 277, 127 Pac. 1002.

**Washington.** *Crevilli v. Chicago, M. & St. P. R. Co.*, 98 Wash. 42, 167 Pac. 66.

"It is conceded that if the federal statute was applicable, the state statute must yield to it, and the plaintiff is not entitled to recover because decedent did not leave surviving him a widow or children, parents or other next of kin dependent upon him." *Long v. Lusk*, *supra*.

Suit by half brothers and sisters of a porter on an interstate passenger train, who were not dependent on him and who received no support from him in his lifetime, cannot be sustained. *New Orleans, M. & C. R. Co. v. Jones*, *supra*.

11. *Garrett v. Louisville & N. R. Co.*, 235 U. S. 308, 59 L. Ed. 242, 35 Sup. Ct. 32, 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769.

surviving widow or husband and children,' and if none, then of the parents, which extends only to the pecuniary loss and damage resulting to them by reason of the death."

§ 597. **Who are "Next of Kin" under Federal Act must be Determined by State Law.** Section 1 of the act provides that suit for the death of an interstate employe may be brought by the personal representative for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents, and, if none, then of the next of kin dependent upon such employe. In the enforcement of the statute it has been contended that the expression "next of kin" as used in the first section of the act should be construed by the common law disregarding the state law defining those words; but the federal Supreme Court has held that the next of kin for the purpose of the recovery under the federal act are the next of kin as established by the law of the state where the right to recover obtains.<sup>12</sup> "Plainly the statute," said the court in the Kenney case, cited, "contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. But as it is urged as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common law significance and therefore as excluding all persons not included in the term under the common law, meaning of course the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the con-

12. *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 60 L. Ed. 762, 36 Sup. Ct. 458.

tention amounts to saying that Congress by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the States and substituted another law for it, when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition since if it be well founded, it would apply equally to the other requirements of the statute—to the provisions as to the surviving widow, the husband and children, and to parents, thus for the purposes of the enforcement of the act overthrowing the legislation of the States on subjects of the most intimate domestic character and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the States, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others."

§ 598. **Illegitimate Children may be Next of Kin within Meaning of Federal Statute.** A statute of the state of North Carolina declares that the illegitimate children of a mother shall be considered legitimate as between themselves and that their estate shall descend and be distributed as if they had been born in lawful wedlock and that in the event of the death of any such child, without children, his estate shall be distributed among his mother and such other persons as would be next of kin as if all the children had been born in lawful wedlock. In an action under the Federal Employers' Liability Act the supreme court of North Carolina held

that by virtue of the foregoing statute, a suit could be maintained by an administrator for the death of an illegitimate son whose mother was dead, for the benefit of the mother's legitimate children who were dependent upon the deceased employe.<sup>13</sup> The decision of the state court was affirmed by the federal Supreme Court.<sup>14</sup> On the other hand, a Kentucky court of appeals, in a suit under the federal act, reached a different conclusion because the law of that state was different from the statute of North Carolina. It was held by that court that a deceased railroad employe who was an unmarried man born out of wedlock, had no next of kin and that his father's widow and children, although dependent upon him, were not beneficiaries under the statute.<sup>15</sup>

13. *Kenney v. Seaboard Air Line R. Co.*, 167 N. C. 14, Ann. Cas. 1916E 450, 82 S. E. 968.

14. *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489, 60 L. Ed.

762, 36 Sup. Ct. 458.

15. *Cincinnati, N. O. & T. P. R. Co., v. Wilson's Adm'r*, 157 Ky. 460, 51 L. R. A. (N. S.) 308, 163 S. W. 493.



LAW LIBRARY  
OF  
LOS ANGELES COUNTY  
POMONA BRANCH

ALL RIGHTS  
RESERVED BY  
LOS ANGELES COUNTY

University of California  
SOUTHERN REGIONAL LIBRARY FACILITY  
305 De Neve Drive - Parking Lot 17 • Box 951388  
LOS ANGELES, CALIFORNIA 90095-1388

Return this material to the library from which it was borrowed.

DATE DUE

JUN 28 2005

SRLF  
2 WEEK LOAN

LAW LIBRARY  
UNIVERSITY OF CALIFORNIA  
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY



AA 000 791 619 0



LAW LIBRARY  
OF  
LOS ANGELES COUNTY